Supreme Court, U.S.
FILED

02 13 17 FEB 28 2003

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JAMES R. COOK,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH M. CARPENTER
Counsel of Record
CARPENTER, CHARTERED
1525 S. Topeka Blvd.
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

76 pp

QUESTIONS PRESENTED

Does the non-adversarial veterans' benefits system necessarily prohibit the use of the traditional adversarial principles of finality utilized in adversarial administrative decisionmaking?

Are 38 U.S.C. §§ 5108, 5109A, and 7111 the only statutory exceptions to finality?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
RULE OF LAW INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	9
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Bailey v. West, 160 F.3d 1360 (Fed.Cir. 1998) (*en banc*) (Michel, J., concurring) 3

Brown v. Gardner, 513 U.S. 115 (1994) 4

Cook v. West, No. 98-1801, 2000 WL 719866 (Table) (Vet.App. June 1, 2000) 1

Chevron U.S.A., Inc. v. Natural Resources Council, Inc., 467 U.S. 837 (1984) 8

Coffy v. Republic Steel Corp., 447 U.S. 191 (1980) 4

Cook v. Principi, 258 F.3d 1311 (Fed.Cir. 2001), *vacated,* 275 F.3d 1365 (Fed.Cir. 2002) 2

Hayre v. West, 188 F.3d 1327 (Fed.Cir. 1999) 2, 3, 7, 8

Hensley v. West, 212 F.3d 1255 (Fed.Cir. 2000) 3

Jaquay v. Principi, 304 F.3d 1276 (Fed.Cir. 2002) (*en banc*) 3, 4

King v. St. Vincent's Hosp., 502 U.S. 215 (1991) 4

Nolen v. Gober, 222 F.3d 1356 (Fed.Cir. 2000) 3

Roberson v. Principi, 251 F.3d 1378 (Fed.Cir. 2001) 3

Sims v. Apfel, 530 U.S. 103 (2000) 4

STATUTES

28 U.S.C. § 1254(1) 1

38 U.S.C. § 501(a) 5, 8

38 U.S.C. § 5107(a) 8

38 U.S.C. § 5108 .....7, 8

38 U.S.C. § 5109A 2, 6, 7, 8

TABLE OF AUTHORITIES – Continued

Page

38 U.S.C. § 7104(a) 7, 8

38 U.S.C. § 7111 ..... 7, 8

REGULATIONS

38 C.F.R. § 3.103(a) 6, 7, 8

38 C.F.R. § 3.105(a) 6

38 C.F.R. § 4.2 2

38 C.F.R. § 20.904 7

38 C.F.R. § 20.904(a) 8

38 C.F.R. § 20.904(a)(1) 8

38 C.F.R. § 20.904(a)(2) 8

38 C.F.R. § 20.904(a)(3) 8

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 2002 WL 31845576 (Fed.Cir.), and reprinted in the Appendix ("App.") at App. 1.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on December 20, 2002.

RULE OF LAW INVOLVED

The rule of law involved is the principle of "finality" of decisions as applied to decisions of the Secretary of the Department of Veterans Affairs.

STATEMENT OF THE CASE

The Petitioner appealed an administrative decision of the Board of Veterans Appeals ("Board") to the United States Court of Appeals for Veterans Claims ("Veterans Court") in *Cook v. West*, No. 98-1801, 2000 WL 719866

(Table) (Vet.App. June 1, 2000). The Veterans Court upheld the ruling of the Board that the alleged failure of the Secretary of the Department of Veterans Affairs to provide Mr. Cook a legally required medical examination under 38 C.F.R. § 4.2 before denying his 1952 claim for service-connected benefits did not constitute clear and unmistakable error ("CUE") under 38 U.S.C. § 5109A.

The Veterans Court rejected Mr. Cook's argument that under *Hayre v. West*, 188 F.3d 1327 (Fed.Cir. 1999), the Secretary's failure to provide a legally required medical examination rendered the original ratings action non-final. On appeal from the Veterans Court to the Federal Circuit, a split panel decision affirmed the decision of the Veterans Court. *Cook v. Principi*, 258 F.3d 1311 (Fed.Cir. 2001), *vacated*, 275 F.3d 1365 (Fed.Cir. 2002).

On January 4, 2002, the Federal Circuit granted Mr. Cook's Petition for Rehearing En Banc and vacated the Panel decision. *Cook*, 275 F.3d at 1366. For purposes of the en banc proceedings, the parties were asked to brief the following two questions:

1. Whether this court's decision in *Hayre v. West*, 188 F.3d 1327 (Fed.Cir. 1999), should be overruled insofar as that case holds that the existence of "grave procedural error" renders a decision of the Veterans' Administration non-final?

2. Whether, if *Hayre* is overruled in this respect, a failure of the Secretary to assist the veteran under the law and regulations applicable at the time (affirmatively demonstrated by the record before the adjudicator in the particular case) can constitute clear and unmistakable error ("CUE") under 38 U.S.C. § 5109A? *See*

Roberson v. Principi, 251 F.3d 1378 (Fed.Cir. 2001).

On December 20, 2002, a split en banc Court of the Federal Circuit held that to the extent that it had created an additional exception to the rule of finality applicable to the decisions of the Secretary at the Regional Office level, *Hayre* is overruled.

REASONS FOR GRANTING THE WRIT

DOES THE NON-ADVERSARIAL VETERANS' BENEFITS SYSTEM NECESSARILY PROHIBIT THE USE OF THE TRADITIONAL ADVERSARIAL PRINCIPLES OF FINALITY UTILIZED IN ADVERSARIAL ADMINISTRATIVE DECISIONMAKING?

The Federal Circuit en banc decision erroneously applies the traditional adversarial principles of "finality," to the non-adversarial administrative proceedings before the Department of Veterans Affairs. The traditional adversarial principles of "finality" are not for application in the non-adversarial proceedings involving the adjudication of veterans' benefits claims. The Federal Circuit has on many occasions correctly noted that Congress created a "paternalistic" system that is "strongly and uniquely pro-claimant[.]" *See Jaquay v. Principi*, 304 F.3d 1276, 1280 (Fed.Cir. 2002) (en banc) (citing *Nolen v. Gober*, 222 F.3d 1356, 1361 (Fed.Cir. 2000) and *Hensley v. West*, 212 F.3d 1255, 1262 (Fed.Cir. 2000)). The veterans' benefits system is "'imbued with special beneficence from a grateful sovereign.'" *Jaquay*, 304 F.3d at 1286 (quoting *Bailey v. West*, 160 F.3d 1360, 1370 (Fed.Cir. 1998) (en banc) (Michel, J., concurring)).

Congress's unequivocal pro-veteran policy objective is clear. *See Jaquay*, 304 F.3d at 1288 (stating that "[t]he veteran-friendly nature of the veterans' benefits system counsels us to construe the diligence requirement . . . in favor of the veteran."). Moreover, any doubt the Court perceives in interpreting the statutes should be resolved in favor of the interpretations urged herein. *See Brown v. Gardner*, 513 U.S. 115, 117-18 (1994); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n. 9 (1991); and *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980). Application of these canons of construction further support the Petitioner's contention that the "rule of finality" as applied in traditional adversarial proceedings is not for application in proceedings involving the adjudication of veterans' benefits.

In *Sims v. Apfel*, 530 U.S. 103 (2000), this Court held that a judicially imposed requirement of issue exhaustion was not appropriate in the context of a Social Security appeal to a Federal District Court because of the non-adversarial nature of such administrative proceedings. Clearly, Congress intended veterans to enjoy a similar, if not greater, non-adversarial relationship with claimants seeking benefits from the Department of Veterans Affairs. The Petitioner asserts that the application and enforcement of traditional adversarial principles of "finality" is inconsistent with Congress's wish to create a non-adversarial proceeding for the allowance of claims of veterans or other qualified claimants for benefits from the Department of Veterans Affairs.

As noted by the dissenting Judges of the Federal Circuit:

> In an adversarial system, it may be appropriate to dismiss a claimant who does not immediately challenge a decision. But in a paternalistic system, where a claimant is led to believe that his or her claim is being fairly and accurately decided to afford him or her the fullest compensation he or she is due, it is readily apparent why a decision may not be promptly challenged. The VA is charged with the development of the merits of a claim and acts as final adjudicator as well; there must be a remedy when it fails in its responsibility. To allow the organization to default in its development of a claim and then to adjudicate it without the possibility of challenge is an injustice. *Cook* at Slip Op. dissent p. 2.

Thus, the en banc decision of the Federal Circuit erroneously applies the traditional adversarial principles of the "rule of finality" in rendering its decision in this matter. The Federal Circuit's analysis is inconsistent with the statutory scheme created by Congress. The traditional adversarial principles of "finality" are not for application in such a sui generis, non-adversarial system. The clearly articulated public policy is to allow for the maximum benefit available under law and not to superimpose the rigid traditional principles of "finality," to the collateral review of previously final decisions of the Secretary. Rather, the principles of "finality" should be afforded greater flexibility in the non-adversarial veterans' benefits scheme so as to allow for the vacating of previously final decisions of the Secretary based upon demonstrated due process violations.

In support of this view and pursuant to 38 U.S.C. § 501(a), the Secretary of the Department of Veterans

Affairs promulgated the following statement of policy regarding procedural due process rights:

> Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right to representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and the decisions thereon, within the purview of this part 3. *See* 38 C.F.R. § 3.103(a).

The Panel decision in *Hayre*, a decision recognizing that a failure to comply with the law, coupled with a lack of notice, may render a prior adjudication non-final, overturned by the en banc Federal Circuit, was in fact consistent with the Secretary's interpretation of the procedural due process rights of claimants. 38 C.F.R. § 3.103(a) expressly provides that it, "is the obligation of the VA to assist a claimant in developing facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law." Additionally, § 3.103(a) clearly and unambiguously mandates that the provisions of this regulation shall "apply to all claims for benefits **and relief**, and the decisions thereon."[1]

---

[1] Prior to the enactment of 38 U.S.C. § 5109A, the only basis in law for a claim of clear and unmistakable error was found in the Agency's regulations at 38 C.F.R. § 3.105(a). This provision unquestionably appears within the purview of part 3 as contemplated by 38 C.F.R. § 3.103(a).

Claimants for VA benefits who have previously final decisions regarding claims for such benefits should be allowed to vacate those decisions based upon a demonstrated denial of due process. The rule of law articulated in the Panel decision in *Hayre* is consistent with the Secretary's statement of policy contained in 38 C.F.R. § 3.103(a). The en banc decision of the Federal Circuit incorrectly applies an inflexible traditional adversarial view of "finality." A more flexible view of "finality" is required in the non-adversarial veteran friendly veterans' benefits adjudicatory scheme.

38 U.S.C. §§ 5108, 5109A, AND 7111 ARE NOT THE ONLY STATUTORY EXCEPTIONS TO FINALITY.

In addition, the en banc decision of the Federal Circuit is predicated upon the erroneous conclusion that the only statutory exceptions to finality are found at 38 U.S.C. §§ 5108, 5109A, and 7111. *See Cook v. Principi*, Slip Op. p. 8, 2002 WL 31845576 (Fed.Cir.). This decision erroneously concluded that Congress had not intended to allow additional exceptions to finality of VA decisions based upon "grave procedural error." *Cook* at Slip Op. p. 8.

However, as was brought to the en banc Court's attention in the Petitioner's Petition for Rehearing En Banc, the Secretary of the Department of Veterans Affairs has interpreted 38 U.S.C. § 7104(a) as a statutory exception to finality. In promulgating 38 C.F.R. § 20.904, the Secretary interpreted § 7104(a) to authorize the vacating of previously final decisions of the Board of Veterans' Appeals based upon the denial of due process of law. The Secretary's regulation goes so far as to provide examples of

when a denial of due process of law shall be conceded to have occurred. *See* 38 C.F.R. §§ 20.904(a)(1), (2), and (3).

The Federal Circuit's decision in this matter limited its analysis to the legislative history of 38 U.S.C. §§ 5108, 5109A, and 7111, as well as the former 38 U.S.C. § 5107(a). The Federal Circuit's decision overlooked the Secretary's interpretation of 38 U.S.C. § 7104(a). Consequently, the Federal Circuit's conclusion that, "The statutory scheme provides only two exceptions to the rule of finality," is incorrect. *Cook* at Slip Op. p. 8.

Contrary to the Federal Circuit's conclusion, the Secretary by regulation at 38 C.F.R. §§ 3.103(a) and 20.904(a) has interpreted 38 U.S.C. §§ 501(a) and 7104(a) as providing two additional exceptions to the rule of finality. Consequently, the Petitioner submits that the Federal Circuit failed to defer to the Secretary's interpretations of 38 U.S.C. §§ 501(a) and 7104(a) as exceptions to the rule of finality. *See Chevron U.S.A., Inc. v. Natural Resources Council, Inc.*, 467 U.S. 837 (1984).

Therefore, the overruling of the Panel decision in *Hayre* was inconsistent with the statutory scheme created by Congress as interpreted by the Secretary of the Department of Veterans Affairs in his regulations at 38 C.F.R. §§ 3.103(a) and 20.904(a).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

KENNETH M. CARPENTER
CARPENTER, CHARTERED
1525 S. Topeka Boulevard
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

Attorney for Petitioner,
James R. Cook

United States Court of Appeals
for the Federal Circuit

00-7171

JAMES R. COOK,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

Kenneth M. Carpenter, Carpenter, Chartered, of Topeka, KS, argued for claimant-appellant.

Martin F. Hockey, Jr., Senior Trial Counsel, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for respondent-appellee. With him on the brief were *Robert D. McCallum, Jr.*, Assistant Attorney General; and *David M. Cohen*, Director. Of counsel on the brief were *Richard D. Hipolit*, Deputy Assistant General Counsel; and *Martie Adelman*, Staff Attorney, Department of Veterans Affairs, of Washington, DC.

Linda E. Blauhut, Paralyzed Veterans of America, of Washington, DC, for amicus curiae Garrett V. Hayre. With her on the brief was *Michael P. Horan*.

On Petition for Rehearing En Banc

DECIDED: December 20, 2002

Before MAYER, *Chief Judge*, FRIEDMAN, *Senior Circuit Judge*, NEWMAN, MICHEL, LOURIE, CLEVENGER,

RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, and PROST, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SCHALL, in which *Senior Circuit Judge* FRIEDMAN and *Circuit Judges* MICHEL, LOURIE, CLEVENGER, RADER, BRYSON, LINN, DYK, and PROST join.

Concurring opinion filed by *Circuit Judge* DYK, in which *Circuit Judge* LINN joins.

Dissenting opinion filed by *Circuit Judge* GAJARSA, in which *Chief Judge* MAYER and *Circuit Judge* NEWMAN join.

SCHALL, *Circuit Judge*.

James R. Cook appeals the decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") in *Cook v. West*, No. 91-1535, 2000 WL 719866 (Table) (Vet. App. June 1, 2000). In its decision, the Veterans Court upheld the ruling of the Board of Veterans Appeals ("Board") that the alleged failure of the Veterans' Administration's[1] Regional Office ("RO") to give Mr. Cook a proper medical examination before denying his 1952 claim for service-connected benefits did not constitute clear and unmistakable error ("CUE") under 38 U.S.C. § 5109A. *See id.* at *2-5. The Veterans Court also rejected Mr. Cook's argument that, under *Hayre v. West*, 188 F.3d 1327 (Fed.

[1] The Veterans' Administration was renamed the Department of Veterans Affairs in 1988. Department of Veterans Affairs Act, Pub.L. No. 100-527, 102 Stat. 2635 (1988). Throughout this opinion, "VA" will be used as an abbreviation for both the Veterans' Administration and the Department of Veterans Affairs.

Cir. 1999), the RO's alleged failure to give him a proper medical examination rendered the RO's denial of service connection non-final. *Cook,* 2000 WL 719866, at *5. Subsequently, a split panel of this court affirmed the decision of the Veterans Court. *Cook v. Principi,* 258 F.3d 1311 (Fed. Cir. 2001), *vacated,* 275 F.3d 1365 (Fed. Cir. 2002). The panel (Mayer, C.J., Friedman, S.J., Rader, J.) held that the Veterans Court did not err in ruling that the RO's alleged violation of the duty to assist could not serve as the basis for a claim of CUE. At the same time, the panel held that the *Hayre* exception to the rule of finality did not apply in Mr. Cook's case. Chief Judge Mayer dissented on the latter point, stating that "a breach of the duty to assist the veteran by failing to provide a proper medical examination vitiates the prior decision of the Regional Office for the purpose of direct appeal." *Cook,* 258 F.3d at 1316 (Mayer, C.J., dissenting).

Mr. Cook petitioned for rehearing *en banc.* In so doing, he argued that, under a proper application of *Hayre,* a showing that the VA violated any statutory or regulatory duty towards a veteran vitiates the finality of a decision regarding the veteran's entitlement to benefits. On January 4, 2002, we granted Mr. Cook's petition for rehearing *en banc* and vacated the panel opinion. *Cook,* 275 F.3d at 1366. For purposes of the *en banc* proceedings, we asked the parties to brief the following two questions:

1. Whether this court's decision in *Hayre v. West,* 188 F.3d 1327 (Fed. Cir. 1999), should be overruled insofar as that case holds that the existence of "grave procedural error" renders a decision of the Veterans' Administration non-final?

2. Whether, if *Hayre* is overruled in this respect, a failure of the Secretary to assist the veteran under

> the law and regulations applicable at the time (affirmatively demonstrated by the record before the adjudicator in the particular case) can constitute clear and unmistakable error ("CUE") under 38 U.S.C. § 5109A? *See Roberson v. Principi,* 251 F.3d 1378 (Fed. Cir. 2001).

We answer the *en banc* questions as follows: First, to the extent that it created an additional exception to the rule of finality applicable to RO decisions, *Hayre* is overruled. Second, a failure of the Secretary to assist a veteran under applicable law and regulations cannot constitute CUE. In Parts I and II of this opinion, respectively, we address the first and second *en banc* questions. In Part III, we consider Mr. Cook's appeal in light of our answers to the *en banc* questions. Doing so, we affirm the decision of the Veterans Court.

DISCUSSION

I.

A. First En Banc Question

> Whether this court's decision in *Hayre v. West,* 188 F.3d 1327 (Fed. Cir. 1999), should be overruled insofar as that case holds that the existence of "grave procedural error" renders a decision of the Veterans' Administration nonfinal?

B. The Rule of Finality

If a veteran fails to appeal from an RO decision concerning a claim, the decision becomes "final," and "the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent

with this title." 38 U.S.C. § 7105(c) (2000). Principles of finality and *res judicata* apply to agency decisions that have not been appealed and have become final. *See Astoria Fed. Savs. & Loan Ass'n v. Solimino,* 501 U.S. 104, 107-08 (1991) (allowing the application of *res judicata* to administrative agency determinations that have attained finality); *Routen v. West,* 142 F.3d 1434, 1437 (Fed. Cir. 1998) (applying finality and *res judicata* to VA decisions). As we observed in *Routen,* "[u]nless otherwise provided by law, the cases are closed and the matter is thus ended." *Routen,* 142 F.3d at 1438.

There are, however, two statutory exceptions to the rule of finality. First, pursuant to 38 U.S.C. § 5108, the Secretary must reopen a claim "[i]f new and material evidence [regarding the claim] is presented or secured." Second, a decision "is subject to revision on the grounds of clear and unmistakable error." 38 U.S.C. §§ 5109A (decision by the Secretary) & 7111 (decision by the Board). These are the only statutory exceptions to the finality of VA decisions.[2]

C. *Hayre v. West*

In *Hayre,* the veteran filed a claim in 1972 for service connection for a "nerve problem." 188 F.3d at 1329. Hayre

[2] We have held that a veteran may bring a claim having the same factual basis as a previously disallowed claim when an intervening and substantive change in law or regulation creates a new basis for entitlement to a benefit. *See Spencer v. Brown,* 17 F.3d 368, 372 (Fed. Cir. 1994); *Routen,* 142 F.3d at 1438. Such a claim is treated as a new claim, however, and not a request for reconsideration of a previously disallowed claim. *See Spencer,* 17 F.3d at 372.

stated on his claim form that he had been treated while in service for "nerves" and that he had "talked to [a] psychiatrist," and he requested that the RO obtain his service medical records ("SMRs"). *Id.* The RO sent a request for the SMRs to the National Personnel Records Center but did not receive them. *Id.* The RO made no further attempts to obtain the records and rejected Hayre's claim without notifying him that his SMRs had not been obtained. The RO told Hayre in its denial notice that "we don't find in your medical records or elsewhere any evidence of a nervous condition." *Id.*

In 1992, Hayre again applied for service-connected disability. Following a VA examination, he was awarded service connection and a disability rating for post-traumatic stress disorder. In 1993, seeking an earlier effective date for the award of service connection, Hayre brought a claim challenging the RO's 1972 decision as "clearly erroneous." Hayre argued that the RO had not obtained the psychiatric SMRs that he had requested and had failed to afford him a VA examination. *Id.* The RO denied the claim, and the Board and the Veterans Court affirmed, treating the claim as a CUE claim.[3] Hayre appealed to us.

---

[3] A veteran who successfully brings a CUE claim is entitled to benefits retroactive to the date of the original claim. *See* 38 U.S.C. § 5109A(b) ("For the purpose of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.").

On appeal, we reversed and remanded. We first held that an RO's single unsuccessful request for pertinent SMRs that are specifically sought by a claimant does not fulfill the RO's duty to assist the veteran in developing facts pertinent to his claim.[4] *Id.* at 1331-32. However, relying on *Bustos v. West,* 179 F.3d 1378, 1381 (Fed. Cir. 1999), we held that such a breach of the duty to assist cannot amount to CUE. *Hayre,* 188 F.3d at 1333.

We next held that the RO's 1972 decision was not final for purposes of appeal. In so doing, we created a third exception to the rule of finality in addition to the two statutory exceptions created by Congress. Specifically, we held that "where there is a breach of the duty to assist in which the VA failed to obtain pertinent SMRs specifically requested by the claimant and failed to provide the claimant notice explaining the deficiency, the claim does not become final for purposes of appeal." *Id.* at 1334. In

---

[4] When *Hayre* was decided, the statutory duty to assist was set forth at 38 U.S.C. § 5107(a) (1994) ("The Secretary shall assist such a claimant in developing the facts pertinent to his or her claim."). In enacting 38 U.S.C. § 5107(a) as part of the Veterans' Judicial Review Act, Pub.L. No. 100-687, § 103(a), 102 Stat. 4105, 4106 (1988), Congress codified the VA's obligation to assist claimants, which had existed in 38 C.F.R. § 3.103(a) since 1972. *See* 38 C.F.R. § 3.103(a) (1987) ("[I]t is the obligation of [the VA] to assist a claimant in developing the facts pertinent to his [or her] claim. . . . "); *Hayre,* 188 F.3d at 1331. The duty to assist is now codified at 38 U.S.C. § 5103A(a) ("The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary."). Section 5103A(a) was added to the statutory scheme when Congress enacted the Veterans Claims Assistance Act of 2000, Pub.L. No. 106-475, 114 Stat. 2096 (2000). *See id.,* § 3(a), 114 Stat. at 2097. The regulation setting forth the duty to assist remains unchanged. *See* 38 C.F.R. § 3.103(a) (2000).

reaching this holding, we stated that "[i]n cases of grave procedural error, . . . the [Veterans Court] has consistently held that RO or Board decisions are not final for purposes of direct appeal." *Id.* at 1333 (citing *Tablazon v. Brown,* 8 Vet. App. 359, 361 (1995); *Hauck v. Brown,* 6 Vet. App. 518, 519 (1994); *Kuo v. Derwinski,* 2 Vet. App. 662, 666 (1992); *Ashley v. Derwinski,* 2 Vet. App. 307, 311 (1992)). We explained that "[a] breach of the duty to assist in which the VA failed to obtain pertinent SMRs specifically requested by the claimant and failed to provide the claimant with notice explaining the deficiency is a procedural error of, at least, comparable gravity [to the errors in the four cited Veterans Court cases] that vitiates the finality of an RO decision for purposes of direct appeal." *Id.* We elaborated on the importance of providing adequate notice to the veteran:

> Notice to the claimant explaining the failure to obtain pertinent and specifically requested SMRs is . . . essential to insuring that the agency of original jurisdiction ("AOJ") will adequately develop a veteran's claim before deciding it on the merits. Furthermore, if the claimant is to effectively appeal his or her case, the claimant must be cognizant of all the evidence considered by the AOJ. Where so much of the evidence in VA adjudications is circumstantial at best, notice explaining the failure to obtain pertinent and specifically requested SMRs is critical to ensuring a proper award for benefits and an effective right to judicial review.

Id. at 1334. We thus concluded that if the Veterans Court "finds that the RO breached the duty to assist [Hayre] in 1972, then the 1972 RO decision is not final for purposes of direct appeal."[5] *Id.* at 1335. We remanded the case to the Veterans Court for further proceedings consistent with our opinion.

D. Whether *Hayre* Should Be Overruled

The government contends that we should overrule the holding of *Hayre* that the finality of a VA decision is vitiated if the VA commits a "grave procedural error" when adjudicating a claim. The government argues that the *Hayre* decision is not supported by statute or legislative history. For his part, Mr. Cook argues that the *Hayre* decision is consistent with Congress' intent to create a system where the veteran is fully and sympathetically assisted in the development of his claims before the VA makes a decision on the merits. He further contends that the holding in *Hayre* recognizes the need for a mechanism to allow a veteran to collaterally challenge a VA decision where the veteran later discovers that the VA breached its duty to assist him in developing his claim.

We agree with the government that *Hayre* should be overruled. The statutory scheme provides only two exceptions to the rule of finality. At the same time, we see nothing in the legislative history of the pertinent statutes – 38 U.S.C § 5109A (CUE challenge to an RO decision), 38

[5] Pursuant to the Veterans Claims Assistance Act, the VA, as part of the duty to assist, is required to notify a claimant when it is unable to obtain relevant records. *See* 38 U.S.C. § 5103A(b)(2).

U.SC. § 7111 (CUE challenge to a Board decision), 38 U.S.C. § 5108 (reopening of a claim based on new and material evidence), and former 38 U.S.C. § 5107(a) (recognizing the VA's duty to assist the claimant in the development of his claims) – that indicates that Congress intended to allow additional exceptions to the finality of VA decisions based upon "grave procedural error."

The purpose of the rule of finality is to preclude repetitive and belated readjudication of veterans' benefit claims. Congress knew how to create exceptions to the finality of VA decisions, and it explicitly did so in two circumstances. It enacted the statutes codifying CUE challenges (sections 5109A and 7111) and the statute allowing claims based on new and material evidence (section 5108). Applying the familiar canon of *expressio unius est exclusio alterius,* we conclude that Congress did not intend to allow exceptions to the rule of finality in addition to the two that it expressly created.[6] *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 168 (1993) (applying the *expressio unius est exclusio alterius* canon in concluding that because Federal Rule of Civil Procedure 9(b) imposes a particularity requirement for pleading two specific types of actions, such particularity is not required for pleading other non-enumerated types of actions); *BMW Mfg. Corp. v. United States,* 241 F.3d 1357, 1361 (Fed. Cir. 2001) ("It thus appears that Congress expressly provided for the exemption of certain merchandise from the [Harbor

[6] *Expressio unius est exclusio alterius* means that "the expression of one thing is the exclusion of another." *Harris v. Owens,* 264 F.3d 1282, 1296 (10th Cir. 2001).

Maintenance Tax]. Where it did not so provide, it is reasonable to conclude that it did not so intend.").

In support of its holding that "grave procedural error" vitiates the finality of a VA decision, the *Hayre* panel relied on the legislative history of the Veterans' Benefits Amendments of 1989, Pub. L. No. 101-237, § 115(a)(1), 103 Stat. 2062, 2065 (1989), which added sections 3004(a)(1) and (2) to title 38 of the United States Code (currently codified as amended at 38 U.S.C. § 5104(a) and (b)). *Hayre,* 188 F.3d at 1333-34. The relevant provision, section 5104(b), provides that when the VA denies a benefit, the claimant must be provided with a statement of the reasons for the decision and a summary of the evidence considered by the VA; it was effective with regard to VA decisions issued after January 31, 1990. Pub. L. No. 101-237, § 115(b), 103 Stat. at 2066. Section 5104(b) was intended to remedy a lack of information in VA notices denying claims. S. Rep. No. 101-126, at 294-97 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1470, 1700-03. There is nothing in the legislative history relating to section 5104(b), however, to indicate that Congress intended that the lack of information in a pre 1990 VA decision could support a claim to reopen a final decision.

As noted above, the *Hayre* panel also relied on four Veterans Court decisions involving "grave procedural error" in support of its conclusion that the VA's single request for Hayre's SMRs and its failure to notify him of its inability to obtain the records vitiated the finality of the 1972 RO decision. *Hayre,* 188 F.3d at 1333. We do not think, however, that these cases provide support for the creation of a third exception to the finality of an unappealed VA decision.

An understanding of the process for obtaining disability benefits will help put the four Veterans Court decisions upon which the *Hayre* panel relied in proper perspective. We outlined the process in *Maggitt v. West,* 202 F.3d 1370, 1375 (Fed. Cir. 1998). A veteran may appeal an adverse RO decision to the Board. Appellate review is initiated by the veteran filing a notice of disagreement ("NOD") with the VA. *See* 38 U.S.C. § 7105(a).[7] The NOD is a written communication from the veteran expressing dissatisfaction or disagreement with an adjudicative decision of the VA. *See* 38 C.F.R. § 20.201; *Collaro v. West,* 136 F.3d 1304, 1308 (Fed. Cir. 1998) (explaining that disagreement between the VA and the veteran over legal entitlement to a particular benefit may form the basis of an NOD). Once the VA receives the veteran's NOD, it must prepare a "statement of the case." *See* 38 U.S.C. § 7105(d)(1). The statement of the case "frames the [VA's] view of the case, and is meant to assist the veteran in gaining every benefit that can be supported in law." *Maggitt,* 202 F.3d at 1375. The veteran is required to file a "formal appeal" with the Board within sixty days from the date the statement of the case is mailed. *See* 38 U.S.C. § 7105(d)(3) ("The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case."); 38 C.F.R. § 20.202. After the Board renders a decision on the merits of the veteran's request for benefits, the veteran may appeal the Board's decision to the Veterans Court. *See* 38 U.S.C. § 7252(a). A veteran has 120 days

[7] The appeal period is one year "from the date of mailing of notice of the result of initial review or determination." 38 U.S.C. § 7105(b)(1).

from the date of receipt of a Board decision to appeal to the Veterans Court. *See* 38 U.S.C. § 7266.

In each of the cases cited by the *Hayre* panel, the Veterans Court held that the time for appealing either an RO or a Board decision did not run where the VA failed to provide the veteran with information or material critical to the appellate process just described. *See Tablazon v. Brown,* 8 Vet. App. 359 (1995) (because the VA did not furnish the veteran with a statement of the case, he was unable to file a "formal appeal" with the Board and the RO rating decision did not become final); *Hauck v. Brown,* 6 Vet. App. 518 (1994) (because the veteran never received notification of claim denial in accordance with 38 U.S.C. § 7105(b)(1), the one-year period in which to file an NOD did not begin to run); *Kuo v. Derwinski,* 2 Vet. App. 662 (1992) (the veteran was not furnished with a statement of the case; therefore, the period in which to lodge a "formal appeal" with the Board did not begin to run); *Ashley v. Derwinski,* 2 Vet. App. 307 (1992) (since the Board did not mail its decision in accordance with 38 U.S.C. § 7104(e) and 38 U.S.C. § 7266, the 120-day period within which to appeal to the Veterans Court did not begin to run).

Tablazon, Hauck, Kuo, and *Ashley* involved straightforward application of 38 U.S.C. §§ 7105(b)(1), 7105(d)(3), and 7266. Section 7105(b)(1) provides that the one-year period which the veteran has to file an NOD does not begin to run until the date of the mailing of notice of the claim denial to the veteran. Section 7105(d)(3) makes the furnishing of a statement of the case the event that triggers the veteran's obligation to file a "formal appeal" with the Board, while pursuant to section 7266, the 120-day period for appealing to the Veterans Court from a decision

of the Board does not begin to run until the Board's decision is mailed to the veteran. In contrast, there is no statutory basis for the *Hayre* panel's holding that a breach of the duty to assist the veteran in developing facts pertinent to his claim would vitiate the finality of an RO decision.

Furthermore, in *Tablazon, Hauck, Kuo,* and *Ashley,* the VA's failure to comply with statutory procedural requirements regarding notification of benefit determinations had the effect of extinguishing the claimant's right to appeal an adverse decision. In Hayre's case, however, regardless of any failure of the duty to assist in the development of evidence, Hayre was afforded notice of the RO decision denying his claim for service connection. If he had filed an NOD with respect to the 1972 administrative decision, the VA would have been required to provide him with a statement of the case, which would have notified him of the basis for the denial of his claim. *See* Pub.L. No. 87-666, 76 Stat. 553 (1962) (adding statement-of-the-case requirement at 38 U.S.C. § 4005, currently codified as amended at 38 U.S.C. § 7105). Thus, the VA's failure to notify Hayre that it had been unsuccessful in obtaining his SMRs did not preclude him from challenging the administrative decision denying his claim and raising the issue of the duty to assist after he was notified of the basis for the decision.[8]

---

[8] If on direct review, the Veterans Court concludes that there was a breach of the duty to assist, it may vacate the decision on appeal and remand the case to the VA for further consideration following compliance with the duty to assist. *See Pond v. West,* 12 Vet. App. 341, 346 (1999).

In summary, a breach of the duty to assist the veteran does not vitiate the finality of an RO decision. We therefore overrule *Hayre* to the extent that it created an additional exception to the rule of finality applicable to VA decisions by reason of "grave procedural error." If additional exceptions to the rule of finality in 38 U.S.C. § 7105(c) are to be created, if [sic] is for Congress, not this court, to provide them. As we discuss next, however, to the extent it stands for the proposition that a breach of the duty to assist cannot constitute CUE, *Hayre* remains good law.[9]

---

[9] Our dissenting colleague, Judge Gajarsa, believes that an applicant for veterans' benefits possesses a property interest of sufficient magnitude to invoke the protection of the Fifth Amendment's Due Process Clause. Starting from that premise, he would hold that, where a breach of the duty to assist results in the denial of benefits, application of the rule of finality is tantamount to a denial of due process and, accordingly, the rule should be vitiated. Thus, Judge Gajarsa would create a new exception to the rule of finality, in order to obviate what he perceives to be a procedural due process violation arising from a breach of the duty to assist.

The Due Process Clause question was not briefed by the parties or argued to us. Nevertheless, assuming *arguendo* that a breach of the duty to assist may implicate the Due Process Clause, we note that the claim adjudication process before the RO and the Board has long provided a structure that affords a veteran a hearing. *See* 38 C.F.R. §§ 3.3-3.14; 19.0-19.7 (1949). During the adjudication of his claim, a veteran may always assert that there has been a breach of the duty to assist. Moreover, as noted, under the regime that has existed since 1988, if the Veterans Court determines that the VA failed to comply with the duty to assist, the court may vacate the decision being appealed and remand the case for further consideration in compliance with the duty to assist. *Pond,* 12 Vet. App. at 346.

If, however, a breach of the duty to assist is not known to the veteran during the adjudication of his claim, and becomes known to the veteran only after the decision to deny his claim for benefits has become

(Continued on following page)

II.

A. Second En Banc Question

Whether, if *Hayre* is overruled in this respect, a failure of the Secretary to assist the veteran under the law and regulations applicable at the time (affirmatively demonstrated by the record before the adjudicator in the particular case) can constitute clear and unmistakable error ("CUE") under 38 U.S.C. § 5109A? *See Roberson v. Principi,* 251 F.3d 1378 (Fed. Cir. 2001).

B. The Concept of CUE

CUE provides a means for collateral attack on a final decision of an RO. This concept, once solely grounded in regulation, *see* 38 C.F.R. § 3.105, is now also governed by statute. In 1997 Congress enacted Pub. L. No. 105-111, 111 Stat. 2271 (1997), which is codified at 38 U.S.C. §§ 5109A and 7111. Section 5109A covers claims of clear and unmistakable error at the RO level, while section 7111

---

final, the veteran may only apply to have the final judgment reopened through the two avenues provided by Congress, CUE and new and material evidence. These two avenues constitute significant departures from the normal rule that final judgments cannot be reopened. For the reasons stated *infra* in this opinion, a breach of the duty to assist may not form the predicate for a CUE claim. Whether it is possible for a veteran to ameliorate the potential harm of a breach of the duty to assist with a claim of new and material evidence is not a matter before us. In any event, the possibility that an error may occur during the claim adjudication process is not a reason to hold the process in violation of the Due Process Clause and therefore vitiate the rule of finality.

covers claims of clear and unmistakable error at the Board level.[10]

Although the two provisions are quite similar, only section 5109A, pertaining to review of an RO decision, is relevant to our inquiry. Section 5109A states in relevant part that:

> (a) A decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.
>
> (b) For the purposes of authorizing benefits, a rating or other adjudicative decision that constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

38 U.S.C. § 5109A.[11]

---

[10] Before the enactment of section 7111, the concept of CUE with respect to Board decisions was not recognized. *See Smith v. Brown*, 35 F.3d 1516, 1526-27 (Fed. Cir. 1994) ("[T]he Secretary correctly interpreted CUE review authority in 38 C.F.R. § 3.105(a) as relating only to review of AOJ adjudicatory decisions and not to those of the Board.").

[11] Section 7111 states in relevant part that:

> (a) A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.
>
> (b) For the purposes of authorizing benefits, a rating or other adjudicative decision of the Board that constitutes a reversal or revision of a prior decision of the Board on

(Continued on following page)

The regulation from which section 5109A was derived, and which remains in place today, provides that final determinations of the RO will be accepted as correct unless CUE is shown. *See* 38 C.F.R. § 3.105(a). Further, like the statute, the regulation provides for the reversal of decisions found to contain CUE and the retroactive award of benefits to the date of the original decision. *Id.* The pertinent language in the regulation is as follows:

> (a) *Error.* Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision.

38 C.F.R. § 3.105(a).

The Veterans Court has rendered decisions addressing the meaning of "clear and unmistakable error," as used in the statute and regulation. In *Russell v. Principi,* the court addressed for the first time the validity of 38 C.F.R.

> the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision.

38 U.S.C. § 7111.

§ 3.105. 3 Vet. App. 310 (1992) (*en banc*). In upholding the validity of the regulation, *id.* at 314, the court set forth the parameters of a successful claim of CUE:

> By its express terms, 38 C.F.R. § 3.105(a) refers to "determinations on which an action was predicated." Therefore, it necessarily follows that a "clear and unmistakable error" under § 3.105(a) must be the sort of error which, had it not been made, would have manifestly changed the outcome at the time it was made.

Id.;[12] *see also Fugo v. Brown,* 6 Vet. App. 40, 44 (1993) ("[E]ven where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, *ipso facto,* clear and unmistakable error."). The requirement that a clear and unmistakable error be one which would have manifestly changed the outcome of the RO's determination was adopted by this court in *Bustos. See* 179 F.3d at 1381 ("[T]o prove the existence of CUE as set forth in § 3.105(a), the claimant must show that an outcome-determinative error occurred.").

In *Russell,* the Veterans Court also explained that in order for an error to rise to the level of CUE, the error must have been made on the record as it existed at the

---

[12] *Russell* addressed a prior version of the CUE regulation. In that version, the first sentence of section 3.105(a) differed slightly from its present counterpart. It read as follows:

"Previous determinations on which an action was predicated, including decisions of service connection, degree of disability, age, marriage, relationship, service dependency, line of duty, and other issues will be accepted as correct in the absence of clear and unmistakable error." *Russell,* 3 Vet. App. at 312-313.

time the decision was made. *See Russell,* 3 Vet. App. at 313-314. According to the court, "[a] determination that there was a 'clear and unmistakable error' must be based on the record and the law that existed *at the time of the prior AOJ . . . decision.*" *Id.* (emphasis added). As explained by the Veterans Court in *Caffrey v. Brown,* 6 Vet. App. 377, 383 (1994), a CUE claim is an attack on a prior judgment that asserts an incorrect application of law or fact. Necessarily, the asserted error must have occurred on the record "as it existed at the time of the disputed adjudication." *Id.* We extended this interpretation of the regulation to section 5109A in *Pierce v. Principi,* 240 F.3d 1348, 1354 (2001) ("We . . . affirm the court's interpretation of the term 'evidence' in § 5109A and [38 C.F.R. § 3.105(a)] as being limited to evidence that was of record at the time the challenged RO decision was made.").

C. Whether a Breach of the Duty to Assist Can Constitute CUE

Mr. Cook urges us to overrule precedent holding that a breach of the duty to assist cannot serve as a basis for CUE. *See Hayre,* 188 F.3d at 1333 (stating that "a breach [of the duty to assist] is not an error of the sort that should be contemplated in the CUE analysis"); *Caffrey,* 6 Vet. App. at 384 (stating that "the VA's breach of the duty to assist cannot form a basis for a claim of CUE because such a breach creates only an incomplete rather than an incorrect record"). Mr. Cook advances three arguments in support of his position. First, he contends that requiring the CUE analysis to be conducted on the record as it existed at the time of the original decision is flawed. He argues that the proper interpretation of section 5109A

allows for all evidence of error to be considered in reviewing a CUE claim, not just evidence that was a part of the original record. Second, Mr. Cook urges that the requirement that an error must be outcome determinative in order to constitute CUE, stated in *Bustos, see* 179 F.3d at 1381, and relied on in part by *Hayre* in its rejection of Hayre's CUE claim, *see* 188 F.3d at 1333, is also flawed. Mr. Cook urges that a lesser standard should be applied consistent with the goal of "fundamental fairness." He suggests that a lesser standard for CUE was advanced by this court in *Roberson v. Principi,* 251 F.3d 1378 (Fed. Cir. 2001). For its part, the government argues that the interpretations of 38 C.F.R. § 3.105 and 38 U.S.C. § 5109A discussed above are supported by the statute and legislative history and, therefore, should be upheld.

We agree with the government that a breach of the duty to assist cannot constitute CUE. Both our precedent and that of the Veterans Court establish two requirements for a CUE claim. First, in order to constitute CUE, the alleged error must have been outcome determinative, *see Bustos,* 179 F.3d at 1381; second, the error must have been based upon the evidence of record at the time of the original decision, *see Pierce,* 240 F.3d at 1354. As explained below, in order to hold that a breach of the duty to assist can form the basis for a CUE claim, we would have to jettison these requirements. We do not think that such a change in the law is warranted.

Turning first to the requirement that the alleged error be outcome determinative, we note that both the regulation and the statute provide that once a prior decision is found to contain clear and unmistakable error it is to be "reversed." *See* 38 C.F.R. § 3.105(a); 38 U.S.C. § 5109A. The call for reversal on account of clear and unmistakable

error clearly suggests that the contemplated error is outcome determinative. *See id.*

The legislative history of section 5109A also supports the conclusion that an alleged error must be outcome determinative in order to constitute CUE. We have held that Congress' intent in drafting section 5109A was to codify and adopt the CUE doctrine as it had developed under 38 C.F.R. § 3.105. *See Pierce,* 240 F.3d at 1353 (noting that the legislative history of section 5109A "reveals Congress' awareness and approval of the decision of the Veterans Court in *Russell,*" and pointing out that the House and Senate Reports, *see* H.R. Rep. No. 105-52, at 2-3, and S. Rep. No. 105-157, at 3, "discuss *Russell* as setting forth the current state of the law which was to be codified by § 5109A"); *Donovan v. West,* 158 F.3d 1377, 1382 (Fed. Cir. 1998) ("Pub. L. No. 105-111 . . . made no change in the substantive standards in the regulation governing modifications of a regional office decision because of 'clear and unmistakable error.'"); *Bustos,* 179 F.3d at 1381 ("38 U.S.C. § 5109A made no change to the substantive standards governing modifications of RO decisions because of CUE . . . This statutory provision merely codified 38 C.F.R. § 3.105 and the Court of Appeals for Veterans Claims' long standing interpretation of CUE."). As stated in the legislative history, the purpose of the bill was to "effectively codify [38 C.F.R. § 3.105], and extend the principle underlying it to BVA decisions." H.R. Rep. No. 105-52, at 2 (1997). In addition, Congress explicitly endorsed the *Russell* interpretation of CUE. The House Report to Pub. L. No. 105-111 cites liberally to the *Russell* and *Fugo* opinions in its discussion of CUE, including the following language from *Fugo:*

> It must always be remembered that clear and unmistakable error is a very specific and rare kind of "error". It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. Thus even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, *ipso facto,* clear and unmistakable. *Russell v. Principi,* 3 Vet. App. 310, 313 (1992) (*en banc*).

H.R. Rep. No. 105-52, at 3 (quoting *Fugo,* 6 Vet. App. at 44). The Senate Report cites to *Russell* in its explanation of the doctrine of CUE: "CVA has ruled that 'clear and unmistakable error' is error that is obvious and was outcome determinative with respect to the decision under review." S. Rep. No. 105-157, at 3.

We turn now to the second requirement of CUE. As noted above, in *Russell,* the Veterans Court held that a determination that there was CUE must be based upon the record that existed at the time of the original RO decision. We have held that the legislative history of section 5109A supports the requirement that the CUE analysis be limited to the record before the prior adjudicator. In *Pierce,* we stated that "[a]lthough the language of § 5109A does not expressly limit the evidence that can be considered in a CUE challenge to evidence that was of record at the time the challenged decision was made, the legislative history of the statute, the purpose of the statute, and the overall statutory scheme for reviewing veterans' benefits decisions all indicate that Congress intended the evidence to be so limited." 240 F.3d at 1353. In

addition, we pointed out that "[a]lthough the House and Senate reports do not expressly discuss *Russell's* holding with respect to the evidence that can be considered when evaluating a CUE claim, they do discuss *Russell* as setting forth the current state of the law that was to be codified by § 5109A." *Id.* Significantly, the House Report explains, "[t]his bill addresses errors similar to the kinds which are grounds for reopening Social Security claims. Under the Social Security system, a claim may be reopened at any time *to correct an error which appears on the face of the evidence used when making the prior decision.*" H.R. Rep. No. 105-52, at 3 (emphasis added).

We conclude that decisions of this court and the Veterans Court concluding that a clear and unmistakable error at the RO level must be outcome determinative and must be apparent from the evidence of record at the time of the original decision are supported by the language of 38 U.S.C. § 5109A and its legislative history. We therefore reject Mr. Cook's request that we overturn existing law to that effect.[13]

---

[13] As noted above, review of Board decisions for CUE is governed by 38 U.S.C. § 7111. The VA has promulgated Board rules implementing section 7111. *See* 38 C.F.R. §§ 20.1400-1411. Although neither section 7111 nor its implementing rules are before us today, it is worth noting that the rules adopt the requirements that in order for an error to rise to the level of CUE, it must be outcome-determinative and must be based upon the record before the Board when it rendered its original decision. Rule 1403 states that, for there to be CUE, "there must have been an error in the Board's adjudication of the appeal which, had it not been made, would have manifestly changed the outcome when it was made." 38 C.F.R. § 20.1403(c). The rule emphasizes that "[i]f it is not absolutely clear that a different result would have ensued, the error cannot be clear and unmistakable." *Id.* Rule 1403 also states that

(Continued on following page)

The requirements that a clear and unmistakable error be outcome determinative and be based on the record that existed at the time of the original decision make it impossible for a breach of the duty to assist to form the basis for a CUE claim. First, a breach of the duty to assist cannot constitute an outcome determinative error. Without the benefit of additional evidence that might have been in the record but for the breach, we may only conclude that, as a result of the breach, the record was incomplete. This cannot be an "outcome-determinative" error. In *Caffrey,* the Veterans Court explained that

> [w]hile it is true that an incomplete record may ultimately lead to an incorrect determination, it cannot be said that an incomplete record is also an incorrect record. If the facts contained in the record are correct, it is not erroneous, although not embodying all of the relevant facts. Rather, an incomplete record is just that – incomplete. . . . Thus, an incomplete record, factually

---

"[r]eview for clear and unmistakable error in a prior Board decision must be based on the record . . . that existed when that decision was made." 38 C.F.R. § 20.1403(b)(1).

In *Disabled American Veterans v. Gober,* 234 F.3d 682 (Fed. Cir. 2000), we were called upon to review the validity of the Board's CUE rules under 38 U.S.C. § 502. Among the rules challenged in *Disabled American Veterans* was Rule 1403(c). It was argued, *inter alia,* that the rule's outcome determinative requirement was inconsistent with section 7111. We rejected that argument. In so doing, we pointed out that, in section 5109A, "which in relevant part is identical to section 7111, Congress expressly adopted the [Veterans Court's] definition of CUE that requires that 'a claimant must show . . . an error would manifestly change the outcome of a prior decision.'" 234 F.3d at 696 (quoting *Bustos,* 179 F.3d at 1381).

> correct in all other respects, is not clearly and unmistakably erroneous.

Caffrey, 6 Vet. App. at 383. Second, a breach of the duty to assist necessarily implicates evidence that was not before the RO at the time of the original decision. In accordance with the duty to assist, the VA is required to help a veteran in obtaining evidence in support of his or her claim. *See* 38 U.S.C. § 5103A. If the VA breaches this duty, the result is that the RO considers the veteran's claim on a record that is incomplete because it does not include all the pertinent evidence. Incomplete or not, however, as explained above, the only record that may be reviewed in the CUE analysis is the record that was before the RO at the time of the original decision. Evidence that should have been part of the record, but was not (because of a breach of the duty to assist), may not be considered. In sum, a breach of the duty to assist cannot constitute CUE.

Finally, we do not agree with Mr. Cook that *Roberson v. Principi* supports the proposition that a breach of the duty to assist can form the basis for a CUE claim. In *Roberson,* a panel of this court reviewed the Veterans Court's rejection of a CUE claim that was based on an alleged breach of the duty to assist relating to a 1984 rating (percentage of disability) decision. We explained that, "[a]s we held in *Hayre v. West,* 188 F.3d 1327, 1332-33 (Fed. Cir. 1999), breach of the duty to assist cannot form the basis for a CUE claim." *Roberson,* 251 F.3d at 1384.

Having rejected the argument that a breach of the duty to assist could serve as the basis for a CUE claim, we went on to "determine the standard that applies when the VA is considering a CUE claim." *Id.* We concluded that, in

adjudicating a CUE claim, the VA is required to follow the approach outlined in *Hodge v. West,* 155 F.3d 1356 (Fed. Cir. 1998), for the situation in which a veteran seeks to reopen a disallowed claim based upon new and material evidence under 38 U.S.C. § 5108. *Roberson,* 251 F.3d at 1384. In *Hodge,* we stated that the VA is "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." 155 F.3d at 1362. In *Roberson,* a critical issue was whether, in addressing Roberson's claim that there was CUE in the 1984 rating decision, the VA and the Veterans Court had erred by failing to recognize that in his original claim, Roberson had sought total disability based upon individual unemployability ("TDIU"). We concluded that, in line with the *Hodge* rubric, once a veteran submits evidence of a medical disability and makes a claim for the highest rating possible and also submits evidence of unemployability, the VA must consider TDIU. We stated that, in order to develop a claim "to its optimum," as required by *Hodge,* the VA "must determine all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled as a claim for TDIU." *Roberson,* 251 F.3d at 1384. We therefore reversed the holding of the Veterans Court that Roberson had failed to make a claim for TDIU before the RO in 1984. *Id.* We remanded the case to the court for consideration of Roberson's appeal of the denial of his CUE claim in light of our decision. *Roberson* does not support Mr. Cook's contention that a breach of the duty to assist may constitute CUE.

III.

Having held that there can be no judicially crafted exception to the rule of finality and that a breach of the duty to assist cannot constitute CUE, we turn now to the facts of this case.

Mr. Cook served in the United States Army from August of 1942 to December of 1945. His service medical records contain a March 1945 diagnosis of "psychoneurosis, anxiety type." When he was recalled for service in 1950, an examination found that he was "not qualified for active duty due to his ulcer." In 1952, Mr. Cook submitted a benefits claim to the RO for service connection for "Stomach Trouble Nervous Stomach." A physical examination revealed a duodenal ulcer. In a neuropsychiatric examination the attending physician noted:

> The present day idea is, generally, that a peptic ulcer may be a visceral expression of long continued anxiety. In this case, a diagnosis of duodenal ulcer has been established. A dual diagnosis should not be made, but it should be clear that the diagnosis of duodenal ulcer includes a psychic or emotional component.

In June of 1952, the RO denied service connection for "stomach trouble and nervousness." It stated that Mr. Cook's ulcer was not incurred or aggravated in service and that the most recent examination had not revealed nervousness. The RO also stated that the "[neuropsychiatric] examination revealed no evidence of a psychiatric disability."

Mr. Cook did not appeal the RO decision to the Board; it therefore became final. *See* 38 U.S.C. § 709 (1952).[14] In July of 1989, Mr. Cook sought to reopen his claim. The Board did so and denied service connection. The Veterans Court, however, reversed and directed the Board to determine Mr. Cook's rating for both his nervous disorder and his ulcer. *Cook v. Brown,* 4 Vet. App. 231, 238 (1993). Thereafter, the RO awarded Mr. Cook a thirty percent rating for his anxiety disorder and a zero percent rating for his duodenal ulcer. The RO made the awards effective as of July 1989 (when Mr. Cook had sought reopening of his claims).

Mr. Cook appealed the RO's decision, contending that the effective date of the award should have been the April 1952 date of the original filing of his claim and that the RO's 1952 decision contained CUE and therefore was nonfinal.[15] The Board rejected Mr. Cook's contention that the 1952 regional office decision constituted CUE, and Mr. Cook appealed to the Veterans Court. While the appeal was pending at the Veterans Court, *Hayre* was decided.

---

[14] At the time Mr. Cook's claim was rejected, the rule of finality codified today in 38 U.S.C. § 7105(c) was set forth in 38 U.S.C. § 709, which stated in relevant part that "[w]hen a claim shall be finally disallowed . . . , it may not thereafter be reopened or allowed." Further, the regulations in place at the time stated that "[a] decision of a rating board unappealed within one year shall be final." 38 C.F.R. § 3.330 (1949). Rating boards, under 38 C.F.R. § 3.5 (1949), were vested with the original jurisdiction to determine the issues raised by Mr. Cook of service connection and disability.

[15] As noted above, the "reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the decision had been made on the date of the prior decision." 38 U.S.C. § 5109A(b).

The Veterans Court ordered briefing by the parties as to the application of *Hayre* to Mr. Cook's case.

Subsequently, in a single-judge unpublished decision, the Veterans Court affirmed the decision of the Board. The court first held that the alleged deficiencies in the RO's 1952 decision did not constitute CUE. The court then rejected Mr. Cook's argument that the RO's failure to give him an adequate medical examination in 1952 violated its duty to assist him, so as to render the 1952 decision not final and make the date of that decision the effective date of his benefits. As to whether Mr. Cook's claim fit within the exception to the rule of finality created by *Hayre,* the court concluded that even if Mr. Cook had established a breach of the duty to assist, the failure to provide him with an appropriate medical examination did not rise to the level of the "grave procedural error" found in *Hayre.*

We affirm the decision of the Veterans Court. In Part I of this opinion, we have overruled *Hayre* insofar as it holds that the existence of "grave procedural error" renders a decision of the VA non-final. In Part II, we have held that a failure of the VA to assist the veteran to the extent required by applicable law and regulations cannot constitute CUE under 38 U.S.C. § 5109A. In the face of these rulings, Mr. Cook's claim for an earlier effective date for his service-connected disability benefits must fail, because the rulings leave Mr. Cook without any ground upon which to claim an earlier effective date.

CONCLUSION

For the foregoing reasons, the decision of the Veterans Court is affirmed.

COSTS

No costs.

AFFIRMED

DYK, *Circuit Judge*, with whom LINN, *Circuit Judge*, joins, concurring.

I fully join the majority's opinion, but wish to make clear that we are not deciding today that a past breach of the duty to assist is without consequence. In particular we are not deciding the effect of a past breach of the duty to assist on a new and material evidence claim.

Unlike a successful clear and unmistakable error (CUE) claim, which is given the effective date of an earlier reversed or revised decision under 38 U.S.C. § 5109A, a successful new and material evidence claim typically is not given retroactive effect. By statute and regulation, a reopened claim generally results in the veteran's receiving payments only from the date that the application was received. 38 U.S.C. § 5110(a) ("Unless specifically provided otherwise in this chapter, the effective date of an award based on . . . a claim reopened after final adjudication . . . shall not be earlier than the date of receipt of application therefor."); 38 C.F.R. § 3.400 ("[The effective date] will be the date of receipt of the claim or the date entitlement arose, whichever is the later.").

Where there has been a material breach of the statutory duty to assist at some time in the past, and that breach by the government prevented the veteran from discovering the new and material evidence at an earlier date, a question arises as to whether retroactive relief is

available in a new and material evidence proceeding. An argument for retroactivity might have particular force where the violation of the duty to assist was unknown to the veteran at the time of the original application, for example, where the Veterans Administration had pertinent undisclosed information in its files and the veteran was unaware that a proper search had not been conducted. Indeed, the government in this case appears to concede that in such circumstances retroactive relief would be available in a new and material evidence proceeding by virtue of 38 C.F.R. § 3.400(q)(2).*

---

* The following colloquy between the court and government's counsel, occurred during oral argument:

THE COURT: Let me ask you a very clear hypothetical. Suppose that I was a veteran, and some years after my service I filed a claim saying I'm disabled and have been ever since an incident that occurred during my time in service. And the regional office or the veteran's board . . . adjudicates my claim in the total absence of any file of my military service and just turns down the claim saying "you just haven't proven your claim." . . . [I]t was my view that my service file clearly showed that I was injured [and] disabled way back then. Can it really be that a decision in which no military medical records were obtained can be immune from revision?

* * *

COUNSEL: [U]nder your hypothetical, if it was adjudicated under the new and material evidence exception the individual would get the benefits going back in time, not just limited to the date of reopening . . . I respectfully refer the court to 38 C.F.R. 3.400(q) in that where a new and material evidence claim to reopen is granted, and is decided in the claimant's favor, if the basis of the decision granting benefits was based on service department records which were for some reason not before the

(Continued on following page)

I express no opinion on these questions, and write merely to emphasize that we are not deciding them today.

Dissenting opinion filed by *Circuit Judge* GAJARSA, in which *Chief Judge* MAYER and *Circuit Judge* NEWMAN join.

I respectfully dissent. In my view, a breach of the duty to assist a veteran by failing to provide a proper medical examination vitiates the prior decision of the regional office ("RO") for purposes of direct appeal. The duty to assist is an integral part of the pro-claimant, non-adversarial claims adjudication process of the Department of Veterans Affairs ("VA"). Congress expressly stated that the VA must "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963 at 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795; *see also* 38 U.S.C. § 5107(a) (1994) ("The Secretary shall assist such a claimant in developing the facts pertinent to the claim."), *amended by* 38 U.S.C. § 5103A (2000) ("Duty to assist claimants"); 38 U.S.C. § 5103 (2000) ("Notice to claimants of required information and evidence"). Breaches of this critical duty compel us to toll the finality of VA decisions, as we held in *Hayre v. West,* 188 F.3d 1327, 1334 (Fed. Cir. 1999), which the majority today overrules, or to declare such a breach a clear and unmistakable error. This would ensure that the

---

original board, the effectiveness date goes back in time as it would in CUE and not as it was normally occurring in the typical claim to reopen.

VA's duty to assist claimants does not become a hollow slogan.

In the veterans' uniquely pro-claimant system of awarding benefits, systemic justice and fundamental considerations of procedural fairness are critical, *Hayre,* 188 F.3d at 1334 (citing S. Rep. No. 101-126 at 294, *reprinted in* 1989 U.S.C.C.A.N. 1469, 1703), which I develop below. This is because, as Congress recognized, in most cases before the RO the veteran is not represented by counsel or a veterans service organization and representation at the Board of Veterans' Appeals ("Board") is discouraged. As a result, a veteran's ability to ensure that a fair and procedurally correct decision has been reached on his or her claim is limited; so too is his or her ability to make a well-informed choice whether to accept or appeal a decision. *See* S. Rep. No. 101-126 at 294, *reprinted in* 1989 U.S.C.C.A.N. 1469, 1703. Thus, VA decisions on records that are less than thoroughly and adequately prepared may go unchallenged and the veteran will lose years of earned benefits that, but for the VA's breach of its duty to assist, he or she would have collected. In an adversarial system, it may be appropriate to dismiss a claimant who does not immediately challenge a decision. But in a paternalistic system, where a claimant is led to believe that his or her claim is being fairly and accurately decided to afford him or her the fullest compensation he or she is due, it is readily apparent why a decision may not be promptly challenged. The VA is charged with the development of the merits of a claim and acts as final adjudicator as well; there must be a remedy when it fails in its responsibility. To allow the organization to default in its development of a claim and then to adjudicate it without the possibility of challenge is an injustice.

The question raised here is whether a claimant should be denied an opportunity "to collaterally challenge a VA decision where the veteran later discovers that the VA breached its duty to assist." *Ante,* at 7. The majority says no such opportunity exists, for two reasons: first, "[p]rinciples of finality and *res judicata* apply to agency decisions that have not been appealed and. . . . [u]nless otherwise provided by law, the cases are closed and the matter is thus ended," *ante,* at 3-4 (citing *Astoria Fed. Savs. & Loan Ass'n v. Solimino,* 501 U.S. at 107-08; *Routen v. West,* 142 F.3d 1434, 1437 (Fed. Cir. 1998)); and second, "[t]he statutory scheme provides only two exceptions to the rule of finality [which do not apply to Cook and Hayre]," *ante,* at 4.

I recognize the importance of the rule of finality; however, enforcement of that policy must be circumscribed by constitutional due process and tempered by fairness and equity.[1] "Although administrative estoppel is favored as a matter of general policy, its suitability may vary

---

[1] The majority addresses the dissenting opinion by stating that the Due Process Clause question was not briefed by the parties and by reemphasizing that Congress only provided two statutory exceptions to the rule of finality. *Ante,* at 12 n.9. However, courts may address a constitutional issue, which is not properly raised by the parties. *See, e.g.,* Ernest H. Schopler, Annotation, *What Issues Will the Supreme Court Consider, Though Not, or Not Properly, Raised by the Parties,* 42 L. Ed. 2d 946 (1999). Certainly, this court may, in the interest of fairness, entertain a constitutional issue subsumed in *Hayre* and presented under a liberal reading of appellant's brief. Congress would not deny a veteran his or her constitutional rights by condoning the VA's failure to assist him or her properly. For the reasons stated *infra* in this dissent, the Constitution is paramount to statutory exceptions to the rule of finality, and thus the public policy of finality cannot trump a veteran's constitutional right to due process.

according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures." *Astoria,* 501 U.S. at 109-10. Thus, where breaches of the statutory duty to assist result in denials of benefits, draconian application of the rule of finality is tantamount to a denial of due process. Because such breaches impose an unconstitutional restraint on an individual's property right, the rule of finality is inappropriate here.

I shall first explain why claimants for, as well as recipients of, veterans' benefits have property rights, then identify my disagreements with the majority's analysis, and finally explain why I believe a breach of the statutory duty to assist veterans imposes an unconstitutional restraint on individual property.

A.

According to *Board of Regents v. Roth,* 408 U.S. 564 (1972), to have a property interest in a government benefit, "a person clearly must have more than an abstract need or desire for [the benefit]. He [or she] must have more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Entitlements derive from "an independent source such as state law," that is, statutes or regulations "that secure certain benefits and that support claims of entitlements to those benefits." *Id.* It is well established that recipients of statutory entitlements such as Social Security disability benefits have a property interest protected by the Due Process Clause of the Fifth Amendment. *See Mathews v. Eldridge,* 424 U.S. 319, 332 (1976) ("[T]he interest of an individual in continued receipt of [Social

Security disability] benefits is a statutorily created property interest protected by the Fifth Amendment." (citing *Richardson v. Belcher,* 404 U.S. 78, 80-81 (1971); *Richardson v. Perales,* 402 U.S. 389, 401-402 (1971); *Flemming v. Nestor,* 363 U.S. 603, 611 (1960); *cf. Arnett v. Kennedy,* 416 U.S. 134, 166 (1974) (Powell, J., concurring in part); *Roth,* 408 U.S. at 576-78; *Bell v. Burson,* 402 U.S. 535, 539 (1971); *Goldberg v. Kelly,* 397 U.S. 254, 261-62 (1970)). For the same reasons property interests were found in these cases, a veteran's interest in the continued receipt of service-connected death and disability benefits is also a property interest. The statutory entitlement to such benefits is set forth in 38 U.S.C. §§ 1110, 1121, 1131, and 1141, and these sections provide an absolute right to benefits to qualified individuals. 38 U.S.C. § 1110 (2000) (providing for wartime disability compensation); 38 U.S.C. § 1121 (2000) (providing for wartime death compensation for designated heirs and dependents); 38 U.S.C. § 1131 (2000) (providing for peacetime disability compensation); 38 U.S.C. § 1141 (2000) (providing for peacetime death compensation for designated heirs and dependents).

Applicants for service-connected death and disability benefits, as distinct from recipients threatened with total or partial termination, also have a property interest in the receipt of those benefits. In *Walters v. Nat'l Assoc. of Radiation Survivors,* the Supreme Court considered whether "a statutory fee limitation, as it bears on the [veterans' benefits system] in operation, deprives a rejected claimant or recipient of 'life, liberty, or property, without due process of law' by depriving him of representation." 473 U.S. 305, 320 (1985) (quoting U.S. Const. amend. V). Although the Supreme Court did not rule on the extent to which applicants for government benefits

have property rights in their statutory entitlements, the Court analyzed the rights to veterans' benefits of the applicants together with the recipients as a statutorily created property interest protected by the Due Process Clause. *Id.* The First, Third, Seventh, and Ninth Circuits have held that the Due Process Clauses apply to applicants seeking property interests. *See, e.g., Ressler v. Pierce,* 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicant for federal rent subsidies); *Kelly v. R.R. Retirement Bd.,* 625 F.2d 486, 489-90 (3d Cir. 1980) (applicant for disabled child's annuity); *Griffeth v. Detrich,* 603 F.2d 118, 120-22 (9th Cir. 1979) (applicants for general relief program); *Wright v. Califano,* 587 F.2d 345, 354 (7th Cir. 1978) (applicant for social security benefits); *Raper v. Lucey,* 488 F.2d 748, 752 (1st Cir. 1973) (applicant for driver's license). *But see Eidson v. Pierce,* 745 F.2d 453, 460 (7th Cir. 1984) (ruling that holders of federal housing subsidies had no property interest because the owners of those units had complete discretion to turn away individual subsidy-holders for any reason or for no reason at all). These courts have reasoned that claimants, just like recipients threatened with termination for alleged ineligibility, have a property interest because of their statutory entitlement to benefits if they meet the substantive requirements.

For veterans basic entitlement to disability compensation derives from two statutes, both found in title 38, sections 1110 and 1131 – the former relating to wartime disability compensation and the latter relating to peacetime disability compensation. Both statutes provide for compensation with the following words: "For disability resulting from personal injury suffered or disease contracted in the line of duty, or for aggravation of a preexisting injury suffered or disease contracted . . . the United

States will pay to any veteran thus disabled . . . compensation. . . . " 38 U.S.C. §§ 1110, 1131 (2000). Here, Cook and Hayre, who meet the threshold eligibility requirements of 38 U.S.C. § 1110, are entitled to procedural due process by virtue of the statutory mandate of the program and the VA's policy and practice in the administration of the veterans' benefits program. It is common ground that a statute declaring that veterans meeting certain eligibility criteria will receive a service-connected benefit secures the benefit for those veterans, just as a blanket of common law rules secures more traditional forms of private property for individuals. *See Roth,* 408 U.S. at 577. As discussed below, no form of "new property" is more clearly earned by the applicant, who received this claim of entitlement to benefits in exchange for service given to his or her country.

Correlatively, the fact that only those who meet specified criteria are entitled to the benefit does not mean that due process is inapplicable until eligibility has been conclusively proven, because this approach would deny the very procedures needed to demonstrate that a property interest exists in the first place. *See id.* ("[R]ecipients in *Goldberg v. Kelly* . . . had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so."). Thus, while at the application stage of the proceedings neither Cook nor Hayre had been administratively adjudged entitled to receive benefits under the regulatory scheme, an applicant for veterans' benefits nonetheless possesses a property interest of sufficient magnitude to invoke the protection of the Fifth Amendment's Due Process Clause. The property interest is not that benefits have been previously received, but the existence of statutory provisions creating the right to a

remedy and defining the terms under which it can be obtained. By establishing substantive standards for qualification, the regulations governing the veterans' benefits system create a legitimate claim the applications of Cook and Hayre will not be denied unless the VA factually determines that they do not suffer from a disability originating from service. Accordingly, their statutory entitlement to benefits constitutes a protected property right.

B.

By focusing primarily on the "red herring" finality issue, the majority avoids application of the interest-balancing test normally applied in due process cases. I understand the majority to imply two basic arguments in dismissing the arguments of Cook and Hayre. The first is to suggest that no remedy is required when breaches of the statutory duty to assist – such as the omission of a complete and thorough medical examination for Cook – are involved. The second is that the affirmatively misleading notice sent to Hayre sufficed to adequately protect veterans' interests in any case, because veterans can be presumed to know the law regarding the veterans' benefits system and their right to appeal.

In my view, the majority's fixation on finality creates a conceptual confusion in identifying the constitutional deprivation present in these cases. In traditional cases arising under the Due Process Clause of the Fifth Amendment, governmental confiscation of property is not difficult to recognize: An individual possesses property and the Government's action deprives the individual of it. Where "new property" interests – that is, statutory entitlements –

tlements – are involved, however, claimants have an interest only in their benefit level as correctly determined under the law, rather than in any particular preordained amount. *See* Charles A. Reich, *The New Property,* 73 Yale L.J. 733 (1964). Thus, while any deprivation of property by the Government implicates the Due Process Clause, only a breach resulting in denial or inadequate allocation of benefits effects a deprivation subject to constitutional constraint. It is the breach, and not the reduction *per se,* that causes the deprivation.

Keeping this point in mind, it is readily apparent that the Supreme Court's application of the Due Process Clause to governmental administrative action has not only encompassed, but indeed has been premised upon, the need for protection of individual property interests against even inadvertent breaches by the Government. *See, e.g., Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1 (1978); *Mathews,* 424 U.S. 319; *Goldberg,* 397 U.S. 254. Properly applied, regulations that govern administrative decisions in such cases do not deprive recipients of property, because a beneficiary whose entitlement should be reduced or terminated under relevant statutes can claim no valid interest in continuation. Administrative decisions that affect statutory entitlements may often be correct. But when the breach – that is, the deprivation of property – occurred because the administrative agent, for reasons beyond the claimant's control, failed to comply with a statutorily mandated duty, constitutional procedures are interposed to prevent such breaches of regulation insofar as feasible. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 436 (1982) (holding that the post-deprivation remedy (the possibility of a negligence suit against the Commission) was insufficient to comply with due process because

petitioner was challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards).

In the veterans' uniquely claimant friendly system of awarding compensation, breaches of the duty to assist are at the heart of due process analysis. If the Constitution provides no protection against the occurrence of such breaches, then the paternalistic interest in protecting the veteran is an illusory and meaningless assurance. The fact that breaches inevitably occur in the administration of any bureaucracy requires the conclusion that when the Secretary administers a property entitlement program, he or she has a constitutional obligation to provide due process before implementing adverse changes in the entitlement level. Otherwise, erroneous reductions or denials of benefits – that is, deprivations of individual property – are effected without due process of law.

C.

Because the breaches in these cases cannot merely be overlooked, I turn to the central constitutional inquiry: what process was due in light of "the practicalities and peculiarities of the case"? *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). In determining what process is due, the court must employ a flexible balancing test that takes into account the particular facts and circumstances, as the need for procedural safeguards varies with the situation: "due process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961). "Due process

is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

When reviewing alleged procedural due process violations, the Supreme Court has distinguished between (1) claims based on established state procedures and (2) claims based on random, unauthorized acts by state employees. *See Daniels v. Williams,* 474 U.S. 327, 331 (1986); *Logan,* 455 U.S. at 435-36. In the latter case, the Due Process Clause is not violated when a state employee intentionally deprives an individual of property or liberty, so long as the State provides a meaningful post-deprivation remedy. *Hudson v. Palmer,* 468 U.S. 517, 531-33 (1984). However, when the deprivation occurs in the more structured environment of established procedures – for example, because an administrative official, for reasons beyond the claimant's control, failed to comply with a statutorily mandated duty – courts must follow the now familiar interest – balancing analysis set forth in *Mathews,* 424 U.S. at 334-35. Identification of the specific dictates of due process generally requires consideration of three distinct factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail." *Id.* These interests are relevant to determining the "content of the notice" as well as its timing and other procedural claims. *Goss v. Lopez,* 419 U.S. 565, 579 (1975).

1. Importance of the Private Interest

The importance of the correct level of veterans' benefits to eligible veterans cannot be overstated. No form of new property is more clearly earned by an applicant or recipient, who received this claim of entitlement to benefits in exchange for service given to his or her country: award through the VA claims procedure is the sole process available to the veteran. He or she cannot sue for disabilities stemming from military service under the Federal Tort Claims Act. *See Feres v. United States,* 340 U.S. 135 (1950). Veterans injured in military service generally lose all or much of their ability to earn a livelihood. Yet under the majority opinion, a man or a woman, after time in service, has no rights that may not be frustrated to serve the shibboleth of finality. The majority makes no effort to balance the interests at stake. In this clash between individual rights and the public policy of finality, the latter, they say, is automatically held to be superior and trumps the former.

2. Risk of Error and Value of Additional Procedures

"[A] primary function of legal process is to minimize the risk of erroneous decisions." *Mackey v. Montrym,* 443 U.S. 1, 13 (1979); *see also Fuentes v. Shevin,* 407 U.S. 67, 80-81 (1972). Consequently, a breach that may cause deprivation of property must be "preceded by notice." *Mullane,* 339 U.S. at 313. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such

nature as reasonably to convey the required information. . . . " *Id.* at 314 (citations omitted); *see also Memphis Light,* 436 U.S. at 14-15 n15 (ruling that "skeletal" notice was constitutionally insufficient because utility customers are "of various levels of education, experience and resources" and "the uninterrupted continuity of [utility service] is essential to health and safety").

The likelihood of error due to ineffective decision notices by the VA is substantial. The General Accounting Office ("GAO") found that:

> [In] over 60 percent (539) of the 898 compensation notices reviewed, insufficient information was found to have been provided on the reason or reasons for VA's decision. GAO found that "Denial notices for compensation claims were especially poor. They often stated only that the claims were denied because service connection was not found."

S. Rep. No. 101-126, at 294, *reprinted in* 1989 U.S.C.C.A.N. 1469, 1701-02. The GAO also noted that the evidence was incomplete in approximately 10 percent of claims and that information about how a veteran could appeal a decision was not included in the notices in 2 to 3 percent of claims. *Id.*

The importance of this information can be seen in the circumstances of Cook and Hayre where the vital failure of effective notice was misleading enough to jeopardize their rights to appeal. Although "Hayre was afforded notice of the RO decision," *ante,* at 12, the notice misleadingly assured Hayre that "we do not find in your medical records or elsewhere any evidence of the existence of a nervous condition" without obtaining the service medical records

Hayre had specifically requested, *ante,* at 4. Notice that affirmatively misleads in this fashion clearly violates the constitutional guarantee of due process. For Cook, the notice denying service connection for "stomach trouble and nervousness" stated that the "[neuropsychiatric] examination revealed no evidence of a psychiatric disability," even though the VA compensation examination in 1952 noted:

> The present day idea is, generally, that a peptic ulcer may be a visceral expression of long continued anxiety. In this case, a diagnosis of duodenal ulcer has been established. A dual diagnosis should not be made, but it should be clear that the diagnosis of duodenal ulcer inculdes [sic] a psychic or emotional component.

Ante, at 23. The denial notice given to Cook did not clearly indicate that the neuropsychiatric report had evidence of a "psychic or emotional component." Although the record does not state whether Cook was aware of the contents of the report before the appeals period had run, it was important for Cook, who was relying on the pro-claimant benefits system, to be notified of what evidence was considered by the VA and how the evidence was used in reaching a decision. Without such knowledge, Cook was not in a position to evaluate its accuracy or propriety and to determine whether or not to contest it. The obvious value of notice of those simple factual determinations is that they were the only data that would have enabled Cook to "choose for himself whether to . . . acquiesce or contest" by filing a timely appeal. *Mullane,* 339 U.S. at 314. As the Supreme Court made clear in *Goldberg,* 397 U.S. at 267, in statutory entitlement cases the Due Process Clause normally requires "timely and adequate notice detailing the reasons" for proposed administrative action.

Such process is constitutionally required whenever the action may be "challenged . . . as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Id.* at 268. The forms of notice delivered to Cook and Hayre are sufficiently misleading that they introduce a high risk of error into the decisionmaking process, because veterans with valid entitlements might wrongly abandon their claims after an initial denial and not reassert them until their right to appeal is barred by the rule of finality.

This is especially true in the circumstances of Cook and Hayre, who relied on the non-adversarial and pro-claimant character of the veterans' benefits system and pursued their statutory entitlements without the assistance of legal counsel. *See* 38 U.S.C. § 5904(c)(1) (prohibiting fee agreements with an attorney until the Board issues a final decision); *Jaquay v. Principi,* 304 F.3d 1276, 1282 (Fed. Cir. 2002) (en banc) ("[T]he law prohibiting lawyers from charging a fee has the practical effect of limiting the ability of veterans to retain a lawyer at the early stages of the claim process."); *Hayre,* 188 F.3d at 1334 (noting that "representation by attorneys is discouraged and infrequent" (quoting S.Rep. No. 101-126, 16 294, *reprinted in* 1989 U.S.C.C.A.N. 1469, 1700-03)). While all citizens are presumed to know the law, that legal fiction is not identical to requiring that veteran claimants must be personally conversant and proficient with the arcane intricacies of an entitlement program that requires voluminous statutes, regulations, manuals, and circulars to administer.

In light of the complexity of the substance and procedures involved in these proceedings, as well as the importance of the interest at stake, I believe that Due Process includes minimal protections for the property interests of

unrepresented veterans. When a veteran is not represented by counsel, the Secretary has a heightened duty to assist veterans by conscientiously developing and obtaining all the relevant evidence. The Secretary must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited. In addition, when a veteran's service medical records are not obtained, as in *Hayre,* the VA's duty to assist is essential, because "the veteran's possession of service medical records is a decidedly abnormal situation. The veteran cannot reasonably be expected to have such records." Department of Veterans Benefits, Veterans Administration, DVB Circular 21-83-5, Procedures for Claims Involving Delayed Receipt of Service Medical Records (Mar. 18, 1983); *see also* VA Veterans Benefits Administration Letter 20-99-60 at 1 (Aug. 30, 1999) ("Service medical records and VA medical center records are to be requested in all cases. These are records considered to be in VA custody.").

Moreover, where so much of the evidence in VA adjudications is circumstantial at best, the results of a medical examination for a veteran such as Cook, are often the determinative factor in the claim adjudication process. An insufficient examination also breaches the VA's duty to assist the veteran in fully developing his or her claim because such evidence is needed to determine whether the veteran is eligible for benefits and the amount of any such benefits. Therefore, administering an inadequate medical exam has as important an effect on the proper resolution of a veteran's claim as a failure to inform the veteran that the VA was unable to obtain medical records. A veteran must rely upon the VA for a thorough medical examination just as he or she must rely upon the department to locate service medical records. Just as a veteran must be able to

assume, absent notice to the contrary, that the VA located and based its claim determination on the requested, complete, and adequate medical records, he or she should be able to assume that the VA performed a complete and thorough medical examination. Because the breach of the duty to assist in this uniquely pro-claimant system jeopardized in a fundamentally unfair manner the right to appeal, the claims of Cook and Hayre should not become final for purposes of appeal.

3. Governmental Interest

In contrast, requiring notices accurately to state what evidence was considered by the VA and how the evidence was used in reaching a decision does not impose a significant financial or administrative burden on the Secretary. In determining the costs to support the veterans' benefits system, Congress has already appropriated its resources with the presumption that statutory requirements will be upheld. Thus, requiring the Secretary to meet the duty to assist – by providing notices that are not affirmatively misleading and by administering complete and thorough medical exams – does not increase the expected administrative burden of providing eligible veterans with statutory entitlements. Moreover, Congress has evaluated the financial and administrative costs of upholding the statutory duty to assist in accordance with the interest at stake. The benefits administered by the Secretary are an entitlement by which the Nation keeps its commitment to our veterans who have sacrificed to protect and defend our freedom. The Government has considered this interest and ensured that it will continue to pay our debts to these men and women. Thus, Congress, through fiscal appropriations presuming that statutory requirements will be upheld,

recognizes the value of demonstrating to veterans – to all those currently serving in our military and to those who may serve in the future – that America honors its commitments to those who have served.

In my view, regardless of the nature of the dispute between the sovereign and the citizen – whether it be a claim for social security benefits or veterans' benefits asserted by a soldier who was disabled during service to his or her country – the citizen's right to procedural due process is constitutionally protected. I am dismayed by the majority's implication that breaches in the administration of veterans' benefits programs may be ignored in determining what protection the Constitution provides. Such breaches all too often plague benefits programs designed to aid veterans. If breaches that might be prevented inexpensively lie entirely outside the ambit of the Due Process Clause, then the non-adversarial and manifestly pro-claimant character of the veterans' benefits system would be the cruelest of shams perpetrated upon our veterans.

I would reverse the judgment of the Court of Appeals for Veterans Claims.

NOTE: Pursuant to Fed. Cir. R. 47.6 this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

00-7171

JAMES R. COOK,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veterans Affairs,

Respondent-Appellee.

ON PETITION FOR REHEARING EN BANC

ORDER

(Filed Feb. 3, 2003)

James R. Cook filed a petition for rehearing en banc, which was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for rehearing en banc is denied.

The mandate of the court will issue on February 10, 2003.

FEB 3 – 2003
Date

FOR THE COURT

/s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

cc: Kenneth M. Carpenter, Esq.
Martin F. Hockey, Jr., Esq.
Linda E. Blauhut, Esq.

00-7171

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES R. COOK
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veteran Affairs,
Respondent-Appellee.

APPEAL FROM UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS IN 98-1801
JUDGE JONATHAN R. STEINBERG

APPELLANT'S PETITION FOR REHEARING EN BANC AND APPENDIX

KENNETH M. CARPENTER
CARPENTER, CHARTERED
1525 S.W. Topeka Blvd.
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

Attorneys for Appellant,
James R. Cook

January 21, 2003

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel for Claimant-Appellant James R. Cook certifies the following:

1. The full name of every party or amicus represented by me is:

James R. Cook

2. The name of the real party in interest represented by me is:

None

3. The parent companies, subsidiaries and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court of agency or are expected to appear in this Court are:

Kenneth M. Carpenter
P.O. Box 2099
Topeka, KS 66601
(785) 357-5251

TABLE OF CONTENTS

PAGE

CERTIFICATE OF INTEREST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

POINT OF LAW TO BE CONSIDERED 2

STATEMENT OF COUNSEL 3

ARGUMENT 4

I. WHETHER THE SECRETARY'S REGULATION AT 38 C.F.R. § 20.904 REPRESENTS AN INTERPRETATION OF 38 U.S.C. § 7104(a) AS CONSTITUTING A STATUTORY EXCEPTION TO FINALITY? 4

II. WHETHER THE SECRETARY'S REGULATION, 38 C.F.R. § 20.904, REQUIRES DEFERENCE BE GIVEN BY THIS COURT TO THE SECRETARY'S INTERPRETATION OF 38 U.S.C. § 7104(a) AS A STATUTORY EXCEPTION TO FINALITY? 5

III. WHETHER, IN LIGHT OF THE SECRETARY'S INTERPRETATION OF 38 U.S.C. § 7104(a) AS A STATUTORY EXCEPTION TO FINALITY, THE PANEL DECISION IN *HAYRE* SHOULD HAVE BEEN OVERRULED BY THE *EN BANC* COURT?..... 6

CONCLUSION 8

TABLE OF AUTHORITIES

PAGE

CASE AUTHORITY

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 6

James R. Cook v. West, No. 91-1535, 2000 WL 719866 (Table) (Vet.App. June 1, 2000) 1, 6

Hager Apparel Co. v. United States, 222 F.3d 1337 (Fed.Cir. 2000) 6

Hayre v. West, 188 F.3d 1327 (Fed.Cir. 1999)..... 2-3, 6-8

STATUTES

38 U.S.C. § 511(a) 2, 7

38 U.S.C. § 5108..... 4-5

38 U.S.C. § 5109A..... 4-5

38 U.S.C. § 7104(a) 2-8

38 U.S.C. § 7111..... 4-5

REGULATIONS

38 C.F.R. § 20.904 ..... 2-5, 7-8

38 C.F.R. § 20.904(a) 7

00-7171

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

JAMES R. COOK,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

APPELLANT'S PETITION FOR REHEARING *EN BANC*

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, James R. Cook respectfully moves for a rehearing *en banc* of the December 20, 2002 decision of the Court affirming the U.S. Court of Claims for Veteran Appeals ("CAVC") in the case of *James R. Cook v. West,* No. 91-1535, 2000 WL 719866 (Table) (Vet.App. June 1, 2000).

POINTS OF LAW TO BE CONSIDERED

Appellant respectfully submits that in its December 20, 2002 decision, the majority opinion overlooked the provisions of 38 C.F.R. § 20.904, which is a regulation of the Department of Veterans Affairs that provides for the

vacating of previously final Board decisions based upon a denial of due process.

The Appellant submits that the current decision is predicated upon the assumption that there are only three statutory exceptions to finality. The Secretary's promulgation of 38 C.F.R. § 20.904 is predicated upon an interpretation of 38 U.S.C. § 7104(a) as a fourth statutory exception to finality.

The current decision overrules the Panel decision in *Hayre* due to the lack of a statutory anchor for such a decision. The Secretary's creation of 38 C.F.R. § 20.904 allows the Board of Veterans' Appeals to vacate the finality of a Board decision. The Panel decision in *Hayre* extends such authority to decisions of the Regional Office. Comparable statutory language to that relied upon by the Secretary in 38 U.S.C. § 7104(a) for the promulgation of 38 C.F.R. § 20.904, exists in 38 U.S.C. § 511(a) as statutory authority to underpin the holding by the Panel in *Hayre*.

STATEMENT OF COUNSEL

Based on my professional judgment, I believe this appeal requires an answer to the overruling of the Panel decision on *Hayre v. West,* 188 F.3d 1327 (Fed.Cir. 1999), as the decision in this matter involves questions of exceptional importance:

> Whether the Secretary's regulation at 38 C.F.R. § 20.904 represents an interpretation of 38 U.S.C. § 7104(a) as constituting a statutory exception to finality?
>
> Whether the Secretary's regulation, 38 C.F.R. § 20.904, requires deference be given by this

Court to the Secretary's interpretation of 38 U.S.C. § 7104(a) as a statutory exception to finality?

Whether, in light of the Secretary's interpretation of 38 U.S.C. § 7104(a) as a statutory exception to finality, the Panel decision in *Hayre* should have been overruled by the *en banc* Court?

ARGUMENT

I. WHETHER THE SECRETARY'S REGULATION AT 38 C.F.R. § 20.904 REPRESENTS AN INTERPRETATION OF 38 U.S.C. § 7104(a) AS CONSTITUTING A STATUTORY EXCEPTION TO FINALITY?

During oral argument before the *en banc* Court, counsel for the Appellant was questioned as to whether he could identify any other statutory exception to finality. Appellant's counsel answered candidly that he was not aware of any other such statutes other than 38 U.S.C. §§ 5108, 5109A, and 7111. Appellant's counsel, after having reviewed the opinion of this Court, including the concurring opinion and the dissenting opinion, realized that there was a relevant VA regulation which had been overlooked by Appellant's counsel and by the Court in consideration of whether there exists any other statutory exception to the finality of decisions.

Appellant's counsel proffers to the Court in support of his Petition for Rehearing 38 C.F.R. § 20.904. Appellant's counsel, after having reviewed the analysis made in the December 20, 2002 opinion, has concluded that 38 C.F.R. § 20.904 represents a regulation promulgated by the

Secretary which relies upon 38 U.S.C. § 7104(a) as authority for the "Vacating [of] a decision [of the Board of Veterans' Appeals]." Appellant submits that the Secretary's regulation must be read as interpreting 38 U.S.C. § 7104(a) as providing a basis for a statutory exception to the finality of Board of Veterans' Appeals decisions.

As such, Appellant asserts that rehearing of his appeal is required by the *en banc* Court based upon the majority opinions reliance upon the conclusion that there exists no other statutory exceptions to finality other than 38 U.S.C. §§ 5108, 5109A, and 7111.

II. WHETHER THE SECRETARY'S REGULATION, 38 C.F.R. § 20.904, REQUIRES DEFERENCE BE GIVEN BY THIS COURT TO THE SECRETARY'S INTERPRETATION OF A 38 U.S.C. § 7104(a) AS A STATUTORY EXCEPTION TO FINALITY?

The Appellant submits that 38 C.F.R. § 20.904 constitutes a reasonable and permissible interpretation of 38 U.S.C. § 7104(a) for the indisputable proposition that § 7104(a) provides a statutory basis for the exception to finality of decisions of the Board of Veterans' Appeals. Pursuant to binding precedent of the United States Supreme Court, as well as this Court, deference to such an interpretation must be afforded. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984); *Hager Apparel Co. v. United States,* 222 F.3d 1337 (Fed.Cir. 2000).

III. WHETHER, IN LIGHT OF THE SECRETARY'S INTERPRETATION OF 38 U.S.C. § 7104(a) AS A STATUTORY EXCEPTION TO FINALITY, THE PANEL DECISION IN *HAYRE* SHOULD HAVE BEEN OVERRULED BY THE *EN BANC* COURT?

The *en banc* opinion of this Court issued on December 20, 2002 overruled the Panel decision in *Hayre, supra.* Based upon the conclusion that "it created an additional exception to the rule of finality applicable to VA decisions by reason of 'grave procedural error.'" *Cook* Slip Op. p. 12. The Appellant suggests that the *en banc* Court must reconsider and rehear this matter in light of the Secretary's interpretation of 38 U.S.C. § 7104(a) creating a statutory exception to the finality of decisions of the Board of Veterans' Appeals. The Appellant believes that the Panel decision in *Hayre* should not have been overruled, because the exception created in *Hayre* is consistent with the exception interpreted by the Secretary as existing in 38 U.S.C. § 7104(a) for decisions of the Board of Veterans' Appeals. The Appellant would assert that the *Hayre* decision is consistent with the Secretary's interpretation of 38 U.S.C. § 7104(a) and can be anchored in the comparable language of 38 U.S.C. § 511(a) which requires that, "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under the law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans."

The Appellant would argue that the language of 38 U.S.C. § 7104(a) requiring the Board to render decisions based upon "applicable provisions of law," is comparable to the language in § 511(a) which requires the Secretary to render decisions, "under the law that affects the provision

of benefits." The Secretary's interpretation of 38 U.S.C. § 7104(a) in 38 C.F.R. § 20.904 expressly contemplates that, "an appellate decision may be vacated by the Board of Veterans' Appeals at any time." The Secretary's interpretation is equally demonstrative that the grounds for vacating such previously final decisions of the Board are to be upon, "Denial of due process." *See* 38 C.F.R. § 20.904(a).

Consequently, the Secretary has interpreted 38 U.S.C. § 7104(a) as a statutory exception to the finality of Board of Veterans' Appeals decisions. In rendering such an interpretation, the Secretary's regulation provides that a previously final Board of Veterans' Appeals decision, without having been reopened with new and material evidence, or without having been found to have contained a clear and unmistakable error, may be vacated based upon a due process violation, made by the Secretary in the adjudication of that final Board decision.

The Appellant would argue that the holding in *Hayre* is entirely consistent with the Secretarys' interpretation of 38 U.S.C. § 7104(a), but merely extends that interpretation to include decisions made by the Secretary which were not the subject of a final Board of Veterans' Appeals decision.

CONCLUSION

For the foregoing reasons, the Appellant prays that this Court will withdraw its opinion of December 20, 2002 and rehear this matter in light of the Secretary's interpretation of 38 U.S.C. § 7104(a) as found in 38 C.F.R. § 20.904.

Respectfully submitted,

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter, #08012
CARPENTER CHARTERED
1525 S.W. Topeka Blvd.
P.O. Box 2099
Topeka, Kansas 66612
(785) 357-5251
Attorney for Appellant,
James R. Cook

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and fifteen copies of the above and foregoing document has been shipped by overnight delivery to the Clerk and two copies to the below named counsel for appellee on the 21st day of January, 2003, addressed to:

Martin F. Hockey, Jr.
Senior Trial Counsel
Commercial Litigation Branch
Department of Justice
Attn: Classification Unit – 8th Floor
1100L. Street, N.W.
Washington, D.C. 20530

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter

[Appendix Omitted In Printing]

Supreme Court, U.S.
FILED
02-317 FEB 28 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JAMES R. COOK,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

SUPPLEMENTAL APPENDIX

KENNETH M. CARPENTER
Counsel of Record
CARPENTER, CHARTERED
1525 S. Topeka Blvd.
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 98-1801

JAMES R. COOK, APPELLANT,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before STEINBERG, *Judge.*

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 28(i), this action may not be cited as precedent.

STEINBERG, *Judge:* The appellant, veteran James R. Cook, appeals through counsel a June 26, 1998, decision of the Board of Veterans' Appeals (BVA or Board) that determined that a June 1952 decision of a Department of Veterans Affairs (VA) regional office (RO) denying VA service connection for nervousness and a duodenal ulcer did not contain clear and unmistakable error (CUE). Record (R.) at 4. In April 1999, the appellant filed a brief and in response the Secretary filed a September 1999 motion for single-judge affirmance. Following the submission of additional pleadings by the parties in October and November 1999, the Court in March 2000 denied the Secretary's motion, granted a motion by the appellant to file out-of-time an October 1999 reply to the Secretary's motion and to raise new argument therein, and ordered the Secretary to file a surresponse brief as to the appellant's October 1999 reply. The Secretary filed such a brief in April 2000. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a).

Single-judge disposition is appropriate here because the case is one whose outcome is controlled by the Court's precedents and is "not reasonably debatable". *Frankel v. Derwinski,* 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the BVA decision.

I. Relevant Background

The facts of this case are set forth in detail in the opinion of this Court in *Cook v. Brown,* 4 Vet.App. 231 (1993); this decision will briefly summarize the facts pertinent to the instant appeal. The veteran had active service in the U.S. Army from August 1942 to December 1945. R. at 15. His service medical records (SMRs) contained a March 1945 diagnosis of "psychoneurosis, anxiety type". R. at 45-46. A September 1950 examination that was made upon his being recalled for service and that was part of the record on appeal (ROA) in *Cook, supra,* but that does not appear to be contained in the record as to the instant appeal, apparently "found [the veteran] not qualified for active duty due to his ulcer". *Cook,* 4 Vet.App. at 233.

In April 1952, he submitted to a VARO a claim for service connection for a nervous stomach. R. at 60-63. At a June 1952 VA examination he was diagnosed as having a duodenal ulcer. R. at 77. At a concurrent neuropsychiatric examination, the examiner noted:

> The present day idea is, generally, that a peptic ulcer may be a visceral expression of long continued anxiety. In this case, a diagnosis of duodenal ulcer has been established. A dual diagnosis should not be made, but it should be clear that the diagnosis of duodenal ulcer includes a psychic or emotional component.

R. at 78. In June 1952, the RO denied service connection for "stomach trouble and nervousness"; the RO indicated that the ulcer was not incurred or aggravated in service and that nervousness had not been found on the most recent examination. R. at 82. The RO also stated that the "[neuropsychiatric] examination revealed no evidence of a psychiatric disability." *Ibid.* The veteran did not appeal that decision to the BVA.

In June 1991, the BVA reopened the veteran's previously disallowed claims but denied service connection therefor (R. at 119-28), and in February 1993 this Court, based on new and material evidence submitted since the June 1952 RO denial, reversed the BVA and ordered the award of service connection for both claimed conditions, *Cook,* 4 Vet.App. at 237-38. Thereafter, the RO awarded service connection and assigned a 30% rating for the veteran's service-connected generalized anxiety disorder and a 0% rating for his service-connected duodenal ulcer disease, both effective as of July 1989. R. at 151. The veteran filed a December 1993 statement in support of claim that said: "I feel the award should be effective April 1952." R. at 154. In July 1994, the RO apparently construed the veteran's statement as a Notice of Disagreement as to the effective date and also as comprising a CUE claim, and determined that the April 1952 RO decision had not contained CUE. *See* R. at 170-71. In the June 26, 1998, BVA decision here on appeal, the Board determined that the April 1952 RO decision had not contained CUE. R. at 4.

II. Analysis

The appellant in his brief asserts that the Board's decision that the April 1952 RO decision did not contain CUE is arbitrary and capricious (Brief at 5-7), and in his October 1999 reply, he asserts that the June 1952 RO decision did not become final based on the opinion of the U.S. Court of Appeals for the Federal Circuit in *Hayre v. West,* 188 F.3d 1327 (Fed.Cir.1999). The Court will address each of these arguments in turn.

A. CUE

An RO decision that has become final, as has the June 1952 RO decision at issue here, generally may not be reversed or amended in the absence of CUE. *See* 38 U.S.C. § 5109A (codifying into law VA regulation 38 C.F.R. § 3.105(a), *infra*); 38 C.F.R. § 3.105(a) (1999); *see also* 38 U.S.C. §§ 5108, 7105(c). Section 3.105(a) of title 38, Code of Federal Regulations, provides:

> Where evidence establishes [CUE], the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal of a prior decision on the grounds of [CUE] has the same effect as if the corrected decision had been made on the date of the reversed decision.

38 C.F.R. § 3.105(a). The CUE claim presented here is a collateral attack on a final RO decision. *See Crippen v. Brown,* 9 Vet.App. 412, 418 (1996); *see also Fugo v. Brown,* 6 Vet.App. 40, 44 (1993).

In *Russell v. Principi,* the Court defined CUE as follows:

> Either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied . . . . [CUE is] the sort of error which, had it not been made, would have manifestly changed the outcome . . . [, an error that is] undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made.

Russell, 3 Vet.App. 310, 313-14 (1992) (en banc); *see also Bustos v. West,* 179 F.3d 1378, 1380 (Fed.Cir.1999) (expressly adopting the "manifestly changed the outcome" language in *Russell, supra*), *cert. denied,* 120 S.Ct. 405 (1999). "A determination that there was a '[CUE]' must be based on the record and the law that existed at the time of the prior . . . decision." *Russell,* 3 Vet.App. at 314. "[T]o raise CUE there must be some degree of specificity as to what the alleged error is and . . . persuasive reasons must be given as to why the result would have been *manifestly* different". *Fugo,* 6 Vet.App. at 44; *see also Crippen,* 9 Vet.App. at 420.

Russell also established that, as a threshold matter, a CUE claim cannot be raised for the first time before this Court but that the claim must have been the subject of a final prior BVA adjudication. *Russell,* 3 Vet.App. at 314-15. On appeal of a BVA determination that there was no CUE in a prior final RO decision, the Court's review is limited to determining whether the Board's conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (38 U.S.C. § 7261(a)(3)(A)) and whether it is supported by an adequate statement of "reasons or bases" (38 U.S.C. § 7104(d)(1)). *See Eddy v.*

Brown, 9 Vet.App. 52, 57 (1996); *Damrel v. Brown,* 6 Vet.App. 242, 246 (1994); *Russell,* 3 Vet.App. at 315.

The appellant alleges that the BVA determined "that there was not [sic] diagnosis of anxiety disorder in service", and asserts that that finding was "clearly erroneous". Reply at 8-9. However, the appellant has not provided a citation describing where the Board made such a factual determination, and the Court cannot find such a determination in the BVA decision on appeal. Moreover, the June 1952 RO decision being assailed for CUE had specifically recognized that the veteran's SMRs showed "treat[ment] on Mar[ch] 20 to 24, 1945[,] for exhaustion with a diagnosis of psychoneurosis, anxiety type." R. at 82. The RO had denied service connection for a nervous condition because it did not find that such a condition was "found on last examination". *Ibid.* Hence, even assuming that the Board did find as a matter of fact that there was no evidence of an in-service diagnosis of an anxiety disorder, the appellant has not provided any reason why that finding would support his challenge to the Board's determination that the June 1952 RO decision had not contained CUE. Thus, the appellant has not provided adequate "specificity as to what the alleged error is and . . . persuasive reasons . . . as to why the result would have been *manifestly* different" had any such error not been made. *Fugo, supra; see also Bustos* and *Crippen,* both *supra; Russell,* 3 Vet.App. at 313-14.

The appellant's second CUE argument is, in essence, that the RO's conclusion that the June 1952 "[neuropsychiatric] examination revealed no evidence of a psychiatric disability" (R. at 82) had denied the existence of evidence in support of his claim. *See Russell,* 3 Vet.App. at 319 ("the RO undebatably committed error . . . in making a

misstatement of fact about the evidence . . . [by] denying the existence of evidence that did indeed exist and was a part of the claims file"); *see also Mason (Sangernetta) v. Brown,* 8 Vet.App. 44, 52-53 (1995) (holding that RO committed error by "denying the existence of" evidence). The Court notes that the June 1952 VA neuropsychiatric examination report indicated that "it should be clear that the diagnosis of duodenal ulcer ***includes a psychic or emotional component***" (R. at 78) (emphasis added), which could support an inference of error as to the RO's conclusion that the examination had not revealed any "evidence of a psychiatric disability" (R. at 82).

However, the RO's error, if indeed it was an error, constitutes CUE only if it would have manifestly changed the outcome of the 1972 RO decision. *See Bustos* and *Russell,* both *supra.* Making that determination is "a task for the Board in the first instance". *Russell, supra; see also Mason (Sangernetta), supra* (noting that "question whether this error rose to the level of CUE under § 3.105(a) is a matter to be left to the Board initially"). In addressing the veteran's CUE claim, the Board stated:

> [Although] the June 1952 VA examiner indicated that anxiety was a component of the veteran's duodenal ulcer, ***the doctor specifically reported that a dual diagnosis was not warranted.*** . . . Further support for the 1952 RO decision can be found in the fact that the veteran's separation examination was entirely negative for any findings suggestive of a psychiatric disorder. A June 1948 VA examination was also negative for any pertinent abnormal findings. At the time of the [RO] decision in June 1952, the record reflected treatment in service for anxiety-type psychoneurosis, with no psychiatric disorder

> at service separation, no psychiatric disorder upon a VA examination in 1948, and a medical statement upon examination in June 1952 that the veteran's diagnosis of duodenal ulcer included a psychic or emotional competent [sic] which 'may be a visceral expression of long continued anxiety.' Based on this evidence, the preponderance of which ***showed no post-service diagnosis of a separate or distinct psychiatric disorder***, the RO found that there was no competent evidence of a current psychiatric ***disability***.

R. at 8-9 (emphasis added). Thus, the Board determined that even if the June 1952 examination report had shown evidence of psychiatric symptomatology, the report did not necessarily support a finding of a ***diagnosable psychiatric condition*** or of a psychiatric condition that constituted a ***disability***. Hence, the Board has concluded that even considering that the June 1952 examination report indicated that the veteran's ulcer had had a psychiatric component, the preponderance of the evidence before the RO in June 1952 was against an award of service connection. In view of the foregoing, the Court concludes that the Board has determined that the error asserted by the appellant as to the RO's apparent denial of the existence of evidence in support of his claim would not "have manifestly changed the outcome" of the July 1972 RO decision, and will affirm the BVA decision because it has a reasonable basis in the record and is thus not arbitrary or capricious. *See Marlow v. Brown,* 5 Vet.App. 146, 151 (1993) (" 'The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational

connection between the facts found and the choice made.'" (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983))); *Bustos* and *Russell,* both *supra.*

The Secretary argues that the above addressed claim of CUE was not raised below and that the Court cannot thus address it in the first instance. Sept.1999 Motion at 7; *see Russell,* 3 Vet.App. at 314-15. However, the Court notes that in his Substantive Appeal to the Board, the veteran specifically stated that the RO had denied his claim "despite th[e] diagnosis" reflected in the June 1952 examination report. R. at 181. Hence, the Court disagrees with the Secretary that the claim was not raised below. In any event, the Court will affirm the BVA's denial of the appellant's CUE claims.

B. Finality of April 1952 RO Decision

The appellant's other contention, based on *Hayre, supra,* is that "the [June] 1952 [RO] decision is not final because at that time the VA examination was inadequate." Reply at 7. Thus, he argues that he should have been granted an earlier effective date as to his service-connected ulcer and anxiety disorder. *See* 38 U.S.C. § 5110(a) ("the effective date of an award based on an original claim . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor"); 38 C.F.R. § 3.400(b)(2) (1999) (providing that effective date shall be date of receipt of claim or date entitlement arose, whichever is later, unless claim received within one year after separation from service); *Tucker v. West,* 11 Vet.App. 369, 372 (1998) (concerning effective date of original claim for

service connection). Recently, in *Simmons v. West,* the Court addressed whether the fact that VA did not obtain an adequate examination could constitute a claim of CUE. *Simmons,* ___ Vet.App. at ____, No. 98-354, slip op. at 6-10 (May 15, 2000). The Court held:

> Given the rather murky state of the law and VA regulations prior to the enactment of the Veterans' Judicial Review Act (VJRA), Pub.L. No. 100-687, Div. A, 102 Stat. 4105-4122 (1988) (found at 38 U.S.C. § 7251 note), insofar as the circumstances under which VA had a duty to assist and what that duty comprised, in order for an appellant to prevail on a contention that a pre-VJRA claim remained open under the *Hayre* approach, ***the appellant must first establish that a breach of an extant and applicable duty to assist occurred in connection with the adjudication of that pre-VJRA claim.***

Id. at __, slip op. at 8 (emphasis added). The appellant has not made such a showing in this case. Moreover, the error alleged in this case, i.e., the failure to provide an adequate examination, is virtually the same error as the one that the Court addressed in *Simmons,* where VA had not provided the veteran with an examination that considered potentially applicable regulations. *Id.* at __, slip op. at 6. As to such an asserted error, the Court held that even assuming that the appellant there had "establish[ed] that a breach of an extant and applicable duty to assist occurred in connection with the adjudication of" his claim, "*Hayre* does not require that a breach of the duty to assist such as is alleged in this case . . . be considered such a grave procedural error as to have tolled the finality of the April 1977 RO decision", *id.* at 7-8, and specifically distinguished the circumstances in *Simmons,* which are

esstentially the same as here, from those in *Hayre,* where the issue involved "a failure to give adequate ***notice*** as to circumstances regarding ***missing SMRs*** that the appellant ***specifically requested*** VA to obtain; rather, the appellant asserts that the RO had had a duty in this case, on its own initiative, to provide for a VA medical examination". *Id.* at 7. Hence, the appellant's argument that the June 1952 RO decision has not become final is unavailing.

III. Conclusion

Upon consideration of the foregoing analysis, the ROA, and the parties' pleadings, the Court holds that the Board's determination that the June 1952 RO decision did not contain CUE is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 38 U.S.C. § 7261(a)(3)(A) and 38 U.S.C. § 5109A and 38 C.F.R. § 3.105(a), and that the appellant has not demonstrated that the BVA committed error – in its findings of fact, conclusions of law, compliance with procedural requirements, or articulation of reasons or bases – that would warrant reversal or remand under 38 U.S.C. §§ 1110, 5107, 7104(a) or (d)(1), or 7261, or *Hayre, supra.*

Therefore, the Court affirms the June 26, 1998, BVA decision.

AFFIRMED.

DATED: JUN – 1 2000

Copies to:

Sean A. Kendall, Esq.
1942 Broadway, # 403
Boulder, CO 80302
General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Supreme Court, U.S.
FILED
MAY 12 2003
OFFICE OF

(3)

No. 02-1317

In the Supreme Court of the United States

JAMES R. COOK, PETITIONER

v.

ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DAVID M. COHEN
THOMAS M. BONDY
MARTIN F. HOCKEY, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1H PR

QUESTION PRESENTED

Whether an otherwise final decision by the Department of Veterans Affairs denying a claim for benefits may be reopened on the ground that the Department committed a "grave procedural error" in adjudicating the claim.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Ashley v. *Derwinski*, 2 Vet. App. 307 (Vet. App. 1992)	6
Astoria Fed. Sav. & Loan Ass'n v. *Solimino*, 501 U.S. 104 (1991)	5
Hauck v. *Brown*, 6 Vet. App. 518 (Vet. App. 1994)	6
Hayre v. *West*, 188 F.3d 1327 (Fed. Cir. 1999)	3
Kuo v. *Derwinski*, 2 Vet. App. 662 (Vet. App. 1992)	6
Lyng v. *Payne*, 476 U.S. 926 (1986)	9
Pierce v. *Principi*, 240 F.3d 1348 (Fed. Cir. 2001)	8, 9
Routen v. *West*, 142 F.3d 1434 (Fed. Cir.), cert. denied, 525 U.S. 962 (1998)	5
Russell v. *Principi*, 3 Vet. App. 310 (Vet. App. 1992)	8
Sims v. *Apfel*, 530 U.S. 103 (2000)	6
Tablazon v. *Brown*, 8 Vet. App. 518 (Vet. App. 1995)	6
United States v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966)	5
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985)	9

Constitution, statutes and regulations:

U.S. Const. Amend. V (Due Process Clause)	9
38 U.S.C. 511	2
38 U.S.C. 5101(a)	2
38 U.S.C. 5103A(a)	2
38 U.S.C. 5103A(d)	2

Statutes and regulations—Continued: Page

38 U.S.C. 5108 ..... 2, 6, 8
38 U.S.C. 5109A 6
38 U.S.C. 5109A(a) 2, 8
38 U.S.C. 5109A(b) 2
38 U.S.C. 7103(a) 2
38 U.S.C. 7104(a) 2, 7
38 U.S.C. 7104(b) 2
38 U.S.C. 7105(c) 2
38 U.S.C. 7105(d)(1) 6
38 U.S.C. 7111 ..... 2, 6
38 C.F.R.:
Section 3.100(a) 2
Section 20.904 7
Section 20.904(a) 7
Section 20.904(b) 7

Miscellaneous:

H.R. Rep. No. 52, 105th Cong., 1st Sess. (1997) 8, 9
S. Rep. No. 157, 105th Cong., 1st Sess. (1997) 8

In the Supreme Court of the United States

No. 02-1317

JAMES R. COOK, PETITIONER

v.

ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The en banc decision of the court of appeals (Pet. App. 1-50) is reported at 318 F.3d 1334. The panel decision of the court of appeals, withdrawn by the en banc court in a decision reported at 275 F.3d 1365, is reported at 258 F.3d 1311. The decision of the United States Court of Appeals for Veterans Claims (Pet. Supp. App. 1-12) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 20, 2002. A second petition for rehearing was denied on February 3, 2003. Pet. App. 51-52. The petition for a writ of certiorari was filed on

February 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A person seeking veterans benefits must file a claim with a regional office (RO) of the Department of Veterans Affairs (VA), formerly known as the Veterans Administration. 38 U.S.C. 5101(a); 38 C.F.R. 3.100(a). The VA is required to make reasonable efforts to help obtain the evidence necessary to substantiate a veteran's claim, including a medical opinion or medical examination if necessary to decide the claim. 38 U.S.C. 5103A(a) and (d). A decision of an RO may be appealed to the Board of Veterans' Appeals (BVA). 38 U.S.C. 7104(a).

RO or BVA decisions that deny claims for benefits are final in the absence of a timely appeal. 38 U.S.C. 511, 7103(a). Final decisions may be reopened, however, to the extent provided by statute or regulation. See 38 U.S.C. 7104(b), 7105(c). There are two statutory grounds for reopening final decisions: the discovery of "new and material evidence," 38 U.S.C. 5108, and "clear and unmistakable error" in the decision of an RO or the BVA, 38 U.S.C. 5109A(a), 7111. A veteran who establishes clear and unmistakable error is entitled to benefits retroactive to the date of his original claim. 38 U.S.C. 5109A(b).

2. In 1952, petitioner submitted a benefits claim to an RO, in which he asserted that he suffered from a "[n]ervous [s]tomach" related to his military service. Pet. App. 28. Physical and neuropsychiatric examinations revealed a duodenal ulcer with a "psychic or emotional component." *Ibid.* The RO denied the claim on the ground that petitioner's condition was not con-

nected to his military service. *Ibid.* Petitioner did not appeal. *Id.* at 29.

In July 1989, petitioner sought to reopen his 1952 claim. Pet. App. 29. The BVA did so and denied the claim, but the United States Court of Appeals for Veterans Claims (Veterans Court) reversed and directed the BVA to determine petitioner's disability rating (*i.e.*, the percentage of disability). *Ibid.* The RO subsequently awarded benefits to petitioner effective July 1989, the date on which he sought to reopen his claim. *Ibid.*

Petitioner appealed the RO's decision, contending that the effective date for benefits should have been 1952, the date of his original claim. Pet. App. 29. In his appeal to the BVA, petitioner argued that the VA had failed to provide him with a certain medical examination in connection with his original application, that the 1952 decision was therefore based on clear and unmistakable error, and that it was for that reason not final. *Id.* at 29-30. The BVA rejected petitioner's claim. *Id.* at 29.

3. The Veterans Court affirmed the decision of the BVA. Pet. Supp. App. 1-12. It held that the asserted failure of the VA to provide the assistance in question in 1952 did not constitute clear and unmistakable error. *Id.* at 4-9. It also rejected petitioner's argument that the asserted failure to assist constituted a "grave procedural error," an exception to finality recognized by the Federal Circuit in *Hayre* v. *West*, 188 F.3d 1327 (1999). Pet. Supp. App. 9-11.

4. A divided panel of the Federal Circuit affirmed the decision of the Veterans Court. 258 F.3d 1311. Interpreting *Hayre* narrowly, the panel majority held that the exception to finality created in that case did not apply to the asserted violation of the VA's duty to

assist in this case. *Id.* at 1313-1315. The dissenting judge would have found *Hayre* applicable to petitioner's case. *Id.* at 1316-1317 (Mayer, C.J., dissenting).

5. The court of appeals granted petitioner's request for rehearing en banc; vacated the panel's decision; and directed the parties to submit supplemental briefs addressing (1) whether *Hayre* should be overruled insofar as it held that the existence of a "grave procedural error" renders an otherwise final decision non-final and (2) whether, if *Hayre* is overruled, a failure by the VA to assist the veteran under then-applicable law can constitute clear and unmistakable error. 275 F.3d 1365, 1366 (2002). A divided en banc court answered these questions by (1) overruling *Hayre*'s "grave procedural error" exception to finality and (2) holding that a failure by the VA to assist the veteran cannot be clear and unmistakable error. Pet. App. 4. In answering the first question, the court applied "the familiar canon of *expressio unius est exclusio alterius*" and concluded that "Congress did not intend to allow exceptions to the rule of finality in addition to the two that it expressly created." *Id.* at 10. In answering the second question, the court held that clear and unmistakable error must be "outcome determinative" and "based on the record that existed at the time of the original decision," and that those requirements make it impossible for a breach of the duty to assist to form the basis for a claim of clear and unmistakable error. *Id.* at 25. The en banc court therefore affirmed the decision of the Veterans Court. *Id.* at 30.

Judge Dyk joined the opinion of the court but filed a concurring opinion, which was joined by Judge Linn. The concurrence noted a question not decided by the court: whether, despite the fact that retroactive relief is ordinarily not available when a proceeding is reopened

based on the discovery of new and material evidence, a breach of the VA's duty to assist might justify the award of such relief. Pet. App. 31-33.

Judge Gajarsa, joined by Chief Judge Mayer and Judge Newman, dissented. In his view, enforcing the rule of finality when the VA has breached its duty to assist would be a violation of the claimaint's due process rights. Pet. App. 33-50.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The en banc court of appeals correctly held (Pet. App. 4-15) that a judicially created "grave procedural error" exception to finality would be inconsistent with general principles of finality and the specific statutory scheme that governs finality of VA decisions.

a. This Court has recognized that basic principles of finality and res judicata apply to unappealed agency decisions. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107 (1991) (quoting *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966)). In the VA context, these principles apply with full force to unappealed decisions of ROs and the BVA. See *Routen* v. *West*, 142 F.3d 1434, 1437 (Fed. Cir.), cert. denied, 525 U.S. 962 (1998).

Congress has explicitly identified two, and only two, grounds for reopening a final VA benefit decision: a showing of clear and unmistakable error in a prior

decision, 38 U.S.C. 5109A, 7111, and the discovery of new and material evidence, 38 U.S.C. 5108. As the en banc court correctly held (Pet. App. 10), these statutory provisions demonstrate that "Congress knew how to create exceptions to the finality of VA decisions" when it wished to. The en banc court was also correct in its conclusion (*id.* at 9-10) that there is nothing in the legislative history of these provisions, or of the provisions concerning the VA's duty to assist, to suggest that Congress intended to contravene the principle that decisions are final except as expressly provided by statute. A third, judicially created, exception to finality would be inconsistent with the statutory scheme.

The Veterans Court decisions on which the Federal Circuit panel relied in *Hayre*, see *Tablazon* v. *Brown*, 8 Vet. App. 359 (1995); *Hauck* v. *Brown*, 6 Vet. App. 518 (1994); *Kuo* v. *Derwinski*, 2 Vet. App. 662 (1992); *Ashley* v. *Derwinski*, 2 Vet. App. 307 (1992), do not support its conclusion that there is a non-statutory basis for reopening otherwise final decisions. As the en banc court explained (Pet. App. 13-14), each of those cases held only that "the time for appealing * * * [a] decision did not run" when the VA failed to provide the veteran with a statement of the case (see 38 U.S.C. 7105(d)(1)) or otherwise failed to comply with some requirement of VA appellate procedure.

b. Citing *Sims* v. *Apfel*, 530 U.S. 103 (2000), petitioner contends (Pet. 3-7) that traditional principles of finality should not apply to the "non-adversarial" system of adjudicating veterans-benefits claims. In *Sims*, this Court declined to impose a requirement of "issue exhaustion" in the adjudication of Social Security claims where there was no statute or regulation that did so. 530 U.S. at 106-110. Petitioner's contention is that the courts *should* create a rule of administrative proce-

dure—an exception to finality based on "grave procedural error"—that cannot be found in any statute or regulation. *Sims* stands as an obstacle to, not support for, such common law augmentation of statutory procedures.

Citing a VA regulation based on 38 U.S.C. 7104(a), which provides for the appeal of RO decisions to the BVA, petitioner also contends (Pet. 7-8) that the en banc court erred in its conclusion that there are only two statutory exceptions to finality. The regulation on which petitioner relies, 38 C.F.R. 20.904, provides that a decision may be vacated by the BVA "at any time," *ibid.*, when benefits have been allowed based on false or fraudulent evidence, 38 C.F.R. 20.904(b), or there has been a denial of due process, which includes a denial of the right of representation, a failure to provide a statement or supplemental statement of the case, and a prejudicial failure to afford a hearing, 38 C.F.R. 20.904(a). Regardless of whether this regulation can be viewed as creating additional exceptions to the rule of finality, it does not support the existence of the exception at issue here, because the regulation lists the grounds on which a decision may be vacated and "grave procedural error" is not one of them.

2. The en banc court of appeals was also correct in holding (Pet. App. 16-27) that the VA's failure to assist a claimant during the factual development of his claim cannot be a basis for a later claim of clear and unmistakable error.

Under the relevant case law, clear and unmistakable error must have been "outcome determinative" and "based upon the evidence of record at the time of the original decision." Pet. App. 21. These principles are wholly consistent with congressional intent.

The first requirement—that the error be outcome-determinative—is based upon 38 U.S.C. 5109A(a), which provides that a VA decision based on clear and unmistakable error "shall be reversed or revised." As the court of appeals explained (Pet. App. 21-22), "[t]he call for reversal on account of clear and unmistakable error clearly suggests that the contemplated error is outcome determinative." The House and Senate Reports support this reading, since they approvingly discuss Veterans Court decisions holding that an error cannot be clear and unmistakable unless it is outcome-determinative. See H.R. Rep. No. 52, 105th Cong., 1st Sess. 2-3 (1997); S. Rep. No. 157, 105th Cong., 1st Sess. 3 (1997).

The second requirement—that the error be based upon the evidence of record at the time of the original decision—also finds support in the statutes and legislative history. First, as the Federal Circuit observed in a case on which the en banc court relied (Pet. App. 23-24), it is difficult to see how an error in a prior decision can be clear and unmistakable "[i]f additional evidence is needed to discern [the] error." *Pierce* v. *Principi*, 240 F.3d 1348, 1353 (Fed. Cir. 2001). Second, because the other statutory basis for reopening a VA decision is the discovery of "new and material evidence" (38 U.S.C. 5108), it is logical to believe, as the Federal Circuit observed in the same case, that the evidence that can be relied upon in a challenge based on clear and unmistakable error is "limited to evidence that was of record at the time the decision was made." *Pierce*, 240 F.3d at 1353. Third, in a case called *Russell* v. *Principi*, 3 Vet. App. 310 (1992) (en banc), the Veterans Court held that a claim of clear and unmistakable error must be based upon the record that existed at the time of the original decision (Pet. App. 23), and although the House and

Senate Reports "do not expressly discuss *Russell*'s holding with respect to the evidence that can be considered," they "do discuss *Russell* as setting forth the current state of the law which was to be codified by § 5109A." *Pierce*, 240 F.3d at 1353. Fourth, as the en banc court of appeals observed (Pet. App. 24), the House Report states that the "clear and unmistakable error" provision "addresses errors similar to the kinds which are grounds for reopening Social Security claims," and those claims "may be reopened at any time to correct an error which appears on the face of the evidence used when making the prior decision." H.R. Rep. No. 52, *supra*, at 3.

The court of appeals held that the requirement that a clear and unmistakable error be outcome-determinative and based on the existing record makes it "impossible for a breach of the duty to assist to form the basis for a ['clear and unmistakable error'] claim." Pet. App. 25. That holding was correct, because a breach of the duty to assist "necessarily implicates evidence that was not before the RO at the time of the original decision" (*id.* at 26) and "it cannot be said that an incomplete record is also an incorrect record" (*id.* at 25 (citation omitted)).

3. The en banc dissent argued (Pet. App. 33-50) that claimants seeking benefits before the VA have a property interest sufficient to invoke the protection of the Fifth Amendment's Due Process Clause, and that, where a breach of the duty to assist results in the denial of benefits, application of the rule of finality is a denial of due process. This Court has never held that claimants have a property interest in the benefits they are seeking from a government agency. See *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985). And even if they do, the en banc majority cor-

rectly held (Pet. App. 15 n.9) that the system for adjudicating veterans-benefits claims—including its two statutory exceptions to finality—satisfies the requirements of due process. That system affords the claimant the right to a hearing, the right to assert a breach of the duty to assist, and the right to appeal an adverse decision to the Veterans Court. See *ibid.* As the en banc court observed (*id.* at 16 n.9), "the possibility that an error may occur during the claim adjudication process is not a reason to hold the process in violation of the Due Process Clause and therefore vitiate the rule of finality." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DAVID M. COHEN
THOMAS M. BONDY
MARTIN F. HOCKEY, JR.
Attorneys

MAY 2003